Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES BLUNT,

Petitioner,

vs.

NORTH DAKOTA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One

Whether the Double Jeopardy Clause barred further proceedings on one count of misapplication of entrusted property over $10,000 wherein the State was alleging multiple misapplied sums and the trial court, after the prosecution rested its case-in-chief, granted an acquittal on one specific allegation of misapplication of entrusted property alleged to be over $10,000.

Question Two

Whether North Dakota's pattern jury instruction on proof beyond a reasonable doubt creates a reasonable likelihood the jury understood the instruction to allow conviction based on proof insufficient to meet proof beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Blunt respectfully petitions for a writ of certiorari to the Supreme Court of North Dakota in *State v. Blunt*, No. 20090110.

OPINION BELOW

The opinion of the North Dakota Supreme Court, App. 1-43, is reported at 2010 ND 144, 785 N.W.2d 909. The relevant trial court proceedings and order, App. 44-84, are unpublished.

JURISDICTION

The North Dakota Supreme Court decision was issued on July 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

North Dakota Century Code § 12.1-23-07 provides:

> 1. A person is guilty of misapplication of entrusted property if the person disposes of, uses, or transfers any interest in property that has been entrusted to the person as a fiduciary, or in the person's capacity as a public servant or an officer, director, or agent, employee of, or a person controlling a financial institution, in a manner that the person knows is not authorized and that the person knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.
>
> 2. Misapplication of entrusted property is:
>
> a. A class B felony if the value of the property misapplied exceeds ten thousand dollars.
>
> b. A class C felony if the value of the property misapplied exceeds five hundred dollars but does not exceed ten thousand dollars.
>
> c. A class A misdemeanor if the value of the property misapplied exceeds two hundred fifty dollars but does not exceed five hundred dollars.
>
> d. A class B misdemeanor in all other cases.

North Dakota Rules of Criminal Procedure, Rule 7, provides in relevant part:

> **Rule 7. The indictment and the information.**
>
> . . .
>
> (d) **Surplusage.** On motion of either party or on its own motion, the court may strike surplusage from the information or indictment.
>
> (e) **Amending an information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.
>
> . . .

North Dakota Rules of Criminal Procedure, Rule 29, provides:

> **Rule 29. Motion for a judgment of acquittal.**
>
> (a) **Before submission to the jury.** After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the

prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) **Reserving decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) **After jury verdict or discharge.**

(1) *Time for a motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within ten days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No prior motion required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) **Conditional ruling on a motion for a new trial.**

(1) *Motion for a new trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality.* The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) *Appeal*

(A) **Grant of a motion for a new trial.** If the court conditionally grants a motion for a new trial and the appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) **Denial of a motion for a new trial.** If the court conditionally denies a motion for a new trial, an Appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of the acquittal, the trial court must proceed as the appellate court directs.

North Dakota Rules of Criminal Procedure, Rule 31, provides in relevant part:

Rule 31. Jury verdict.

. . .

(b) **Partial verdicts, mistrial, and retrial.**

(1) *Multiple defendants.* If there are multiple defendants, the jury may return a verdict at any time during its deliberations for any defendant about whom it has agreed.

(2) *Multiple counts.* If the jury cannot agree on all counts for any defendant, the jury may return a verdict on those counts on which it has agreed.

(3) *Mistrial and retrial.* If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The prosecution may retry any defendant on any count on which the jury could not agree.

North Dakota Rules of Criminal Procedure, Rule 36, provides:

Rule 36. Clerical error.

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

STATEMENT OF THE CASE

I. Statement of the Case as to Question One

Petitioner Charles Blunt was the Executive Director of North Dakota's Workforce Safety and Insurance ("WSI") from 2004 to 2007. The North Dakota State Auditor's Office conducted a performance review of WSI in 2006. The Auditor's report questioned the use of public funds at WSI, specifically noting more than $18,000 in certain expenditures. App. 2, ¶ 2.

As a result of the Auditor's report, Blunt was charged with two counts of misapplication of entrusted property in violation of N.D.C.C. § 12.1-23-07(1). Count I charged Blunt with a class B felony for misapplying more than $10,000 in WSI funds. According to discovery, these funds included: gift certificates given to WSI employees; food, beverages, flowers, balloons, decorations, costume rentals, ornaments, and gifts for WSI meetings; and food and convention expenses provided to legislators. These sums totaled $11,384.29. *See* N.D.C.C. § 12.1-23-07(2)(a) (misapplication of entrusted property exceeding $10,000 is a class B felony). Count II charged Blunt with a class C felony for misapplying more than $500 in WSI funds for illegal bonuses paid to three high-ranking WSI executives. These sums totaled $7,200. *See* N.D.C.C. § 12.1-23-07(2)(b) (misapplication of entrusted property exceeding $500 but less than $10,000 is a class C felony). *See* App. 2-3, ¶ 3.

Following a preliminary hearing, the district court concluded the State had failed to establish probable cause and dismissed the complaint. The North Dakota Supreme Court reversed and remanded on appeal, concluding "the district court erred in concluding there was not probable cause to believe that an offense had been committed or that Blunt had committed it." *See State v. Blunt*, 2008 ND 135, ¶ 32, 751 N.W.2d 692. App. 3, ¶ 4.

On remand to the district court, the State filed an information and Blunt was arraigned before a different district court judge. After the arraignment Blunt filed pretrial motions, including a motion for a bill of particulars. In its response to this motion, the State noted, in addition to evidence of the gift certificates, meeting expenses, and expenditures on legislators in Count I, it also intended to present evidence at trial in Count I that Blunt: (1) had illegally authorized payment of sick leave to a WSI executive who was resigning but was not sick; (2) had failed to recoup relocation expenses owed to WSI by this same executive; and (3) had illegally committed $150,000 in grant money to the North Dakota Firefighter's Association under a grant program that did not exist. App. 3, ¶ 5. Blunt's pretrial motions included objections, both procedural and constitutional, to the addition of these new bases of criminal liability in Count I. Blunt's constitutional objections included double jeopardy objections based on arguments of duplicity. App. 71, 83-84.

The case was tried to a jury. At the close of the State's case-in-chief, Blunt moved for a judgment of acquittal under N.D.R.Crim.P. 29. App. 4, ¶ 7. The district court stated:

> The grant program . . . I'm going to grant the motion in regards to the grant program. We'll have to figure out how to address that. But that amount will not be considered by the Jury, as I'm going to dismiss that portion of the allegation, is one way to put it, I guess. . . .
>
> So, I guess, I don't – I'm finding there is insufficient evidence for that portion of it to go to the Jury. But everything else is going to stay. So simply, that portion will be out. But we'll go forward on the others with that, then.

App. 4, ¶ 7. After the district court ruled on Blunt's N.D.R.Crim.P. 29 motion, the State questioned, "[W]hen you look at a Rule 29, the rule is, is a count out, is a count in, is there sufficient evidence for that count to go forward?" App. 5, ¶ 7; App. 51-52. The prosecutor also stated:

> MS. FELAND: . . . It isn't really a situation where you can pick and choose and say, you know what, I find this evidence credible. I don't find this other evidence credible. I mean, it's all part and parcel of one charge. They're not separate and individual charges. They are all part of one.

> So, I guess, my question for the Court is, you know, on what basis you can take the position that certain pieces of evidence are not going to be able to be considered by the Jury? And I say that because, again, it's all charged as an ongoing course of conduct that happened within a specific period of time. And so when you do that, I don't know how you can pick and choose pieces of evidence.

App. 52. The following colloquy then occurred between the court and the State:

> THE COURT: But, guess what, that's the way it is. I mean, I don't think you proved that portion of it. You charge if out that way. If I say, oh, that can go forward, too, where am I at when they come back guilty? You've alleged $150,000 . . . and I get a Jury that can say, oh, golly, we're out $150,000 . . .
>
> . . .
>
> THE COURT: So I think it's appropriate and it's carved out of there. I'm going to say they can't consider that amount . . . in coming to a conclusion on Count I.
>
> MS. FELAND: . . . So there is no discussion about the grants for all practical purposes, as if it never existed as part of this charge. Is that what I'm understanding?
>
> THE COURT: It is going to be in the closing instructions that they can't consider those amounts. So there shouldn't be any

> more argument about it. . . . It's like it was a separate count, so to speak, and it's been dismissed.

App. 5, ¶ 7; App. 54-55.

At the close of all the evidence, the following colloquy occurred:

> MR. SUHR: Your Honor, I guess, Ms. Feland and I did discuss with respect to the Rule 29 issue that was brought up yesterday on the grants. . . .
>
> If you read Rule 29, it talks about granting or denying a Rule 29 with respect to an offense. And that would mean granting or dismissing based upon Count I as a whole, or Count II as a whole, rather than partial, I guess, dismissal of a specific factual theory available for the Jury to consider in support of one count.
>
> It's analogous, if you will, to a conspiracy charge where there are multiple overt acts that are alleged in support of the conspiracy. The Defense could argue that one or more of those overt acts lacks sufficient factual strength to support a conviction. But that doesn't mean that you would then pull that factual theory out of the case for consideration by the Jury.
>
> In essence, it treats a Rule 29 as de facto motion to suppress facts in evidence rather than a view of whether sufficient evidence has been presented to bring an offense

forward. And I think the use of the word "offense" in Rule 29, makes it specific that it's count, it's the charge, not any one specific factual line of thought within the charge.

And the Court, having found there to be sufficient factual evidence with respect to all but the grant expenses, I think that requires it be taken forward.

THE COURT: . . . I'm indicating there is insufficient evidence to go before the Jury to find a conviction on the Firemens Fund grant program as an offense. And that's how I'm going to rule. And I'm going to issue an instruction along those lines that they are not to consider that in considering Count I.

MR. HOFFMAN: Well, my understanding is you granted the motion that was made under Rule 29. Correct?

THE COURT: Correct.

MR. HOFFMAN: Well, given what the State just said, then Mr. Blunt is not guilty of Count I at this point in time, and I would move that we not proceed on Count I whatsoever.

THE COURT: Understand. Not going to happen. It's just like I just informed, so we'll go on.

App. 5-6, ¶ 8; App. 57-59. In its closing instructions, the court instructed the jury:

> Evidence not Considered
>
> As a matter of law, the Court has determined, you are not to consider any evidence of the Fireman's grant funds in reaching your verdict.

App. 6, ¶ 8.

The jury found Blunt guilty on Count I and not guilty on Count II. Blunt filed a post-trial motion, arguing that the district court's granting of a part of his N.D.R.Crim.P 29 motion for judgment of acquittal required acquittal on all of Count I. App. 6, ¶ 9; *see* App. 71-84. The court denied the motion. App. 6, ¶ 9; App. 44-46. Blunt appealed to the North Dakota Supreme Court. App. 6, ¶ 9.

Blunt argued to the North Dakota Supreme Court that the district court's acquittal on Count I barred any further prosecution on that Count. *See* App. 7, ¶ 11. The North Dakota Supreme Court ruled against Blunt, holding that the district court's action was not an acquittal. App. 7-15. More specifically, the Court stated, "A review of the entire record demonstrates the district court's intent was not to grant a judgment of acquittal on Count I, but rather was to preclude the jury from considering evidence of the grant money in determining whether Blunt had misapplied entrusted property." App. 10, ¶ 16. In conclusion, the Court also stated:

> Rather than submit the unsupported theory to the jury and risk having a verdict that may be based upon an unsupported factual finding, the court merely instructed the jury not to consider evidence of the grant money and removed the issue from the jury's consideration. Under the circumstances in this case, the court's actions were proper and did not require an acquittal on Count I.

App. 15, ¶ 20.

II. Statement of the Case as to Question Two

Over Blunt's objections, App. 62-66, the district court instructed the jury on proof beyond a reasonable doubt using the North Dakota pattern jury instruction on proof beyond a reasonable doubt. App. 48-49, 60. North Dakota has used this pattern jury instruction since approximately 1995. *See State v. Schneider*, 550 N.W.2d 405 (N.D. 1996). Blunt contended that the North Dakota pattern jury instruction on proof beyond a reasonable doubt creates a reasonable likelihood the jury understood the instruction to allow conviction based on proof insufficient to meet proof beyond a reasonable doubt. *See Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

Blunt appealed his objections to the North Dakota Supreme Court. *See* App. 15, ¶¶ 21-22. The North

Dakota Supreme Court upheld the North Dakota pattern jury instruction on proof beyond a reasonable doubt. App. 16-19.

REASONS FOR GRANTING THE WRIT

Question One

Whether the Double Jeopardy Clause barred further proceedings on one count of misapplication of entrusted property over $10,000 wherein the State was alleging multiple misapplied funds and the trial court, after the prosecution rested its case-in-chief, granted an acquittal on one specific allegation of misapplication of entrusted property alleged to be over $10,000.

Blunt contends the North Dakota Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court. An examination of the relevant decisions of this Court in regard to double jeopardy reveals the North Dakota Supreme Court decided this important federal question of double jeopardy in a way that conflicts with those relevant decisions of this Court.

Under Rule 29(a), N.D.R.Crim.P., the district court found there was insufficient evidence to support the State's allegation that Blunt misapplied $150,000 in grant money. The court granted Blunt's motion for judgment of acquittal under Rule 29(a) as to the charge that Blunt misapplied $150,000 in grant

money. Blunt contends, "An order entering such a finding thus meets the definition of acquittal that our double jeopardy cases have consistently used: It 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Smith v. Massachusetts*, 543 U.S. 462, 467-468 (2005). The State had alleged that Blunt misapplied $150,000 in grant money, and the district court acquitted Blunt of misapplying $150,000 in grant money. This finding met some, if not all, of the "key, 'factual element[s] of the offense charged,'" that being misapplication of entrusted funds over $10,000. This was an acquittal. *See Sanabria v. United States*, 437 U.S. 54, 71 (1978).

The district court's acquittal of misapplication of $150,000 in grant money has "double jeopardy effect." *Yeager v. United States*, ___ U.S. ___, 129 S.Ct. 2360, 2367 (2009). It cannot be ignored, or treated as a mere dismissal. It is "not . . . correct to characterize the trial court's action as a 'dismissal' of a discrete portion of the count." *Sanabria v. United States*, 437 U.S., at 66. "Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." *Sanabria v. United States*, 437 U.S., at 65. Here, the State did not charge the grant money in a separate count. When the State argued to the district court that Rule 29(a) applied to the total offense and not just part of the offense, the district court countered that the State chose to bring the multiple allegations in one count. There was no reconsideration by the

judge, *Smith v. Massachusetts*, 543 U.S., at 471-473, and there is no reason to doubt the finality of the judge's decision that Blunt was not guilty of misapplying $150,000 in grant money. *See Smith v. Massachusetts*, 543 U.S., at 470

The double jeopardy clause will attach to a preverdict acquittal, even one which is patently wrong in law, *Smith v. Massachusetts*, 543 U.S., at 473, and creates a bar to any further proceedings to secure a conviction on Count I. *Smith v. Massachusetts*, 543 U.S., at 467. Even if the judge's action is "based upon an egregiously erroneous foundation," *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), its finality is unassailable. *Yeager v. United States*, 129 S.Ct., at 2368. Therefore, any further action on Count I, after the district court's acquittal on the grant money, was barred by the Double Jeopardy Clause.

Question Two

Whether North Dakota's pattern jury instruction on proof beyond a reasonable doubt creates a reasonable likelihood the jury understood the instruction to allow conviction based on proof insufficient to meet proof beyond a reasonable doubt.

North Dakota courts, using the North Dakota pattern jury instruction on proof beyond a reasonable doubt, are routinely denying the constitutional right of criminal defendants to have their cases decided on a proper standard of reasonable doubt. This has been occurring for over a decade. Blunt contends the

pattern instruction allows convictions at a standard below that which is constitutionally required for proof beyond a reasonable doubt. Blunt contends that this is an important question of federal law that has not been, but should be, settled by this Court.

First, there is no clear distinction between the "firm and abiding conviction" language of the North Dakota pattern jury instruction on proof beyond a reasonable doubt, App. 60, and the "firm belief or conviction" language of the North Dakota pattern jury instruction defining clear and convincing evidence, App. 61. While the pattern on reasonable doubt starts out by properly stating reasonable doubt, it quickly becomes watered down by equating reasonable doubt with clear and convincing evidence.

The pattern instruction also does not inform the factfinder that the proof must be greater than the preponderance of the evidence standard and the clear and convincing evidence standard. Blunt contends this violates due process under our Federal Constitution. *See Addington v. Texas*, 441 U.S. 418, 433 (1979), wherein this Court held in regard to the clear and convincing evidence standard: "To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." Blunt contends this holding should be extended to reasonable doubt.

The instruction also does not correctly convey the concept of reasonable doubt to the jury. *Victor v.*

Nebraska, 511 U.S. 1, 5 (1994). There is a reasonable likelihood that the jury will understand the instruction to allow conviction based on proof insufficient to meet proof beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S., at 6.

a. The instruction does not define the proof in terms of possibilities and probabilities. In *California v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93, fn. 6 (1981), this Court spoke of clear and convincing evidence in terms of " . . . a higher probability than is required by the preponderance-of-the-evidence standard," citing C. McCormick, Evidence 320, p. 679 (1954). In *Victor v. Nebraska*, 511 U.S. 1, 14 (1994), the Court spoke of " . . . the very high level of probability required by the Constitution in criminal cases." Also, in *Victor v. Nebraska*, 511 U.S., at 11, the Court wrote: " . . . In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty," citing 1 Works of James Wilson, 519 (J. Andrews ed. 1896).

b. The instruction does not define the proof with language which states that the jury "needs to reach a subjective state of near certitude of the guilt of the accused." In *Victor v. Nebraska*, 511 U.S., at 15, the Court spoke of reasonable doubt in terms of requiring " . . . the need to reach a subjective state of near certitude of the guilt of the accused," citing *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

c. The instruction does not define the proof as all reasonable doubt. A reasonable doubt is any reasonable doubt, which is all reasonable doubt. Such language clarifies the proof and impresses upon the jury the importance of the proof. In *Victor v. Nebraska*, 511 U.S., at 28, Justice Blackmun, with whom Justice Souter joined, concurring in part and dissenting in part, wrote, " . . . unless guilt is established beyond *all* reasonable doubt, the accused shall go free." (Emphasis added).

d. The instruction does inform the jury that the State is not required to prove guilt beyond all doubt. *See Addington v. Texas*, 441 U.S. 418, 430 (1979). However, the instruction does not inform the jury of the context of this language. In *Victor v. Nebraska*, 511 U.S., at 17, 20, the Court recognized that "everything is open to some possible or imaginary doubt; also, that a reasonable doubt is "distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Blunt contends that failure to completely charge this language in its full context violates due process under our Federal Constitution. In the words of *Victor v. Nebraska*, "there was nothing else in the instruction to lend meaning to the phrase." *Victor v. Nebraska*, 511 U.S., at 16. Also, "the rest of the instruction provided insufficient context to lend meaning to the phrase." 511 U.S., at 21.

e. The final paragraph of the instruction equates "beyond a reasonable doubt" with "a firm and abiding conviction of the Defendant's guilt," and then

ties this to "a full and fair consideration of the evidence presented in the case and not from any other source." Blunt contends this paragraph is misleading and violates Federal due process. The jury decides the facts of the case from the evidence presented in the case, but a reasonable doubt can arise from the evidence or from the lack of evidence. In *Jackson v. Virginia*, 443 U.S. 307, 317 (1979), the Court wrote, "A 'reasonable doubt,' at a minimum, is one based upon 'reason.'" Further explaining, the Court also wrote, "A 'reasonable doubt' has often been described as one 'based on reason which arises from the evidence or lack of evidence,'" citing *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972). *Jackson v. Virginia*, supra, at fn. 9. The final paragraph, therefore, is misleading, and, in fact, directs the jury away from any lack of evidence in deciding if the State's proof is beyond a reasonable doubt.

On all these grounds, Blunt requests this Court to grant this petition to determine, finally, whether the North Dakota pattern instruction on proof beyond a reasonable doubt is constitutional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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This opinion is subject to petition for rehearing

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2010 ND 144

State of North Dakota, Plaintiff and Appellee

v.

Charles Blunt, Defendant and Appellant

No. 20090110

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Bruce A. Romanick, Judge.

AFFIRMED.

Opinion of the Court by Sandstrom, Justice.

Cynthia Mae Feland (argued) and Lloyd Clayton Suhr (on brief), Assistant State's Attorneys, 514 East Thayer Avenue, Bismarck, N.D. 58501, for plaintiff and appellee.

Michael Ray Hoffman, P.O. Box 1056, Bismarck, N.D. 58502-1056, for defendant and appellant.

State v. Blunt

No. 20090110

Sandstrom, Justice.

[¶1] Charles Blunt appeals from an order deferring imposition of sentence entered upon a jury verdict finding him guilty of misapplication of entrusted property. We affirm.

I

[¶2] Blunt was the Executive Director of Workforce Safety and Insurance ("WSI") from 2004 to 2007. The State Auditor's Office conducted a performance review of WSI in 2006. The Auditor's report questioned the use of public funds at WSI, noting more than $18,000 in expenditures which allegedly failed to comply with constitutional provisions, state law, and policies of the Office of Management and Budget. *See State v. Blunt,* 2008 ND 135, ¶ 2, 751 N.W.2d 692.

[¶3] As a result of the Auditor's report, Blunt was charged with two counts of misapplication of entrusted property in violation of N.D.C.C. § 12.1-23-07(1). Count I charged Blunt with a class B felony for misapplying more than $10,000 in WSI funds for gift certificates given to WSI employees; food, beverages, flowers, balloons, decorations, costume rentals, ornaments, and gifts for WSI meetings; and food and convention expenses provided to legislators. *See* N.D.C.C. § 12.1-23-07(2)(a) (misapplication of entrusted property exceeding $10,000 is a class B felony).

Count II charged Blunt with a class C felony for misapplying more than $500 in WSI funds for illegal bonuses paid to three high-ranking WSI executives. *See* N.D.C.C. § 12.1-23-07(2)(b) (misapplication of entrusted property exceeding $500 but less than $10,000 is a class C felony).

[¶4] Following a preliminary hearing, the district court concluded the State had failed to establish probable cause and dismissed the complaint. We reversed and remanded on appeal, concluding "the district court erred in concluding there was not probable cause to believe that an offense had been committed or that Blunt had committed it." *Blunt,* 2008 ND 135, ¶ 32, 751 N.W.2d 692.

[¶5] On remand to the district court, the State filed an information and Blunt was arraigned. After the arraignment Blunt filed numerous motions, including a motion for a bill of particulars. In its response to this motion, the State noted, in addition to evidence of the gift certificates, meeting expenses, expenditures on legislators, and employee bonuses, it intended to present evidence at trial that Blunt: (1) had illegally authorized payment of sick leave to a WSI executive who was resigning but was not sick; (2) had failed to recoup relocation expenses owed to WSI by this same executive; and (3) had illegally committed $150,000 in grant money to the North Dakota Firefighter's Association under a grant program that did not exist.

[¶6] Prior to trial, Blunt moved to bar the State from aggregating the value of multiple items misapplied so as to reach the $10,000 threshold for a class B felony, arguing that each item allegedly misapplied was a separate offense. He requested the district court rule that only an individual item allegedly exceeding $10,000 is relevant to prove a class B felony. The district court ruled that the State was allowed to include the value of all items misapplied to reach the grading thresholds under N.D.C.C. § 12.1-23-07(2).

[¶7] The case was tried to a jury. At the close of the State's case-in-chief, Blunt moved for a judgment of acquittal under N.D.R.Crim.P. 29. The district court concluded the State had presented insufficient evidence to go to the jury on the allegations regarding the grant money, but "everything else" should go to the jury:

> The grant program. . . . I'm going to grant the motion in regards to the grant program. We'll have to figure out how to address that. But that amount will not be considered by the Jury, as I'm going to dismiss that portion of the allegation, is one way to put it, I guess. . . .
>
> So, I guess, I don't – I'm finding there is insufficient evidence for that portion of it to go to the Jury. But everything else is going to stay. So simply, that portion will be out. But we'll go forward on the others with that, then.

After the district court ruled on Blunt's N.D.R.Crim.P. 29 motion, the State questioned whether the court could dismiss only that part of the charge in Count I involving the grant money and argued that the entire count should be submitted to the jury. The following colloquy then occurred between the court and the attorney for the State:

> THE COURT: But, guess what, that's the way it is. I mean, I don't think you proved that portion of it. You charge it out that way. If I say, oh, that can go forward, too, where am I at when they come back guilty?. . . .
>
> . . . .
>
> THE COURT: So I think it's appropriate and it's carved out of there. I'm going to say they can't consider that amount . . . in coming to a conclusion on Count I.
>
> MS. FELAND: So then am I under the understanding it is part of the Court's ruling, since the Court has said that there will be no comment about that, that includes comments from either side? So there is no discussion about the grants for all practical purposes, as if it never existed as part of this charge. It that what I'm understanding?
>
> THE COURT: It is going to be in the closing instructions that they can't consider those amounts.

[¶8] At the close of all the evidence, Blunt moved the court "to enter the judgment of acquittal granted

as to Count I" under N.D.R.Crim.P. 29, and the State again argued that the grant money allegations should be submitted to the jury. The district court again denied Blunt's motion on all allegations other than the grant money and reiterated its conclusion:

> I'm indicating there is insufficient evidence to go before the Jury to find a conviction on the Firemens Fund grant program as an offense. And that's how I'm going to rule. And I'm going to issue an instruction along those lines that they are not to consider that in considering Count I.

In its closing instructions, the court instructed the jury:

> Evidence not Considered
>
> As a matter of law, the Court has determined, you are not to consider any evidence of the Fireman's grant funds in reaching your verdict.

[¶9] The jury found Blunt guilty on Count I and not guilty on Count II. Blunt filed a post-trial motion, arguing that the district court's granting of a part of his N.D.R.Crim.P. 29 motion for judgment of acquittal required acquittal on all of Count I. The court denied the motion. The court entered an order deferring imposition of sentence, and Blunt appeals.

[¶10] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal is timely under N.D.R.App.P. 4(b). This Court

has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. §§ 29-01-12 and 29-28-06.

II

[¶11] Blunt contends the district court erred when it did not grant a judgment of acquittal on all of Count I after concluding there was insufficient evidence to allow allegations regarding the grant money to go to the jury. Blunt contends the district court's action constituted an acquittal on Count I and any further prosecution on that Count was barred.

[¶12] Under N.D.R.Crim.P. 29(a), the district court is authorized, upon the defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Thus to grant a motion for judgment of acquittal under Rule 29, "a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged." *State v. Maki,* 2009 ND 123, ¶ 7, 767 N.W.2d 852 (quoting *State v. Kautzman,* 2007 ND 133, ¶ 10, 738 N.W.2d 1); *see also State v. Ness,* 2009 ND 182, ¶ 11, 774 N.W.2d 254; *State v. Hammeren,* 2003 ND 6, ¶ 6, 655 N.W.2d 707. When considering a motion for judgment of acquittal, "the trial court, upon reviewing the evidence most favorable to the prosecution, must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Hammeren,* at ¶ 6 (quoting *State v. Steinbach,* 1998 ND 18, ¶ 16, 575 N.W.2d 193).

[¶13] Blunt contends that because the district court stated it was granting the motion for judgment of acquittal as to the grant money, the court's action constituted an acquittal of the offense charged in Count I. In determining what constitutes an acquittal, however, the label used by the district court is not conclusive, and "we look at the substance of the judge's ruling to determine whether it actually represents a resolution of some or all of the factual elements of the offense charged." *State v. Deutscher,* 2009 ND 98, ¶ 8, 766 N.W.2d 442 (quoting *State v. Jackson,* 2005 ND 137, ¶ 5, 701 N.W.2d 887). In *United States v. Pacheco,* 434 F.3d 106, 112 (1st Cir. 2006), the court, interpreting Fed.R.Crim.P. 29 in a case in which the trial court purported to grant a "partial" judgment of acquittal on a portion of a single-count indictment, concluded:

> [T]he question of what constitutes a "judgment of acquittal" is not governed either by the form of the trial judge's ruling or by his characterization of it. *See United States v. Scott,* 437 U.S. 82, 96, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978); [*United States v.*] *Martin Linen* [*Supply Co.*], 430 U.S. [564,] 571, 97 S. Ct. 1349 [(1977)]. Rather, a reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571, 97 S. Ct. 1349; *see Gonzalez* [*v. Justices of the Mun. Ct.*], 420 F.3d [5,] 8-9 [(1st Cir. 2005)]. A resolution in the defendant's favor of a

> necessary factual element of the offense is a definitive determination that the defendant cannot be convicted.

[¶14] In *Blunt,* 2008 ND 135, ¶ 7, 751 N.W.2d 692, we identified the elements of the offense of misapplication of entrusted property under N.D.C.C. § 12.1-23-07(1):

> (1) the disposal, use, or transfer; (2) of any interest in property; (3) which has been entrusted to the defendant; (4) as a fiduciary or in his capacity as a public servant; (5) in a manner he knows is not authorized; (6) and that he knows to involve a risk of loss or detriment to; (7) the owner of the property or the government.

See also State v. Barendt, 2007 ND 164, ¶ 10, 740 N.W.2d 87 (recognizing and listing the "seven elements" of misapplication of entrusted property under N.D.C.C. § 12.1-23-07).

[¶15] On Count I, the State provided multiple evidentiary bases and legal theories to support its allegation that Blunt had misapplied entrusted property in violation of N.D.C.C. § 12.1-23-07(1). Included in Count I were the State's allegations regarding gift certificates, meeting expenses, legislator expenses, sick leave, and relocation expenses. To find a violation under Count I, the jury did not have to find the State proved each and every one of the instances of improper expenditures alleged in Count I. The State is not required to prove multiple transactions to establish an offense under N.D.C.C.

§ 12.1-23-07(1), as long as all seven elements of the offense are present. *State v. Jelliff,* 251 N.W.2d 1, 7 (N.D. 1977). Removing the allegations regarding the grant money from the jury's consideration did not result in there being insufficient evidence to sustain a conviction of the offense charged. *See Ness,* 2009 ND 182, ¶ 11, 774 N.W.2d 254; *Maki,* 2009 ND 123, ¶ 7, 767 N.W.2d 852. There was ample evidence remaining which, if believed by the jury, was sufficient to establish the essential factual elements of the offense and support a conviction of misapplication of entrusted property. *See Hammeren,* 2003 ND 6, ¶ 6, 655 N.W.2d 707.

[¶16] A review of the entire record demonstrates the district court's intent was not to grant a judgment of acquittal on Count I, but rather was to preclude the jury from considering evidence of the grant money in determining whether Blunt had misapplied entrusted property. The court in its discussions with counsel on the record expressly stated its intent that the remaining allegations would be submitted to the jury, and the court's final instructions directed the jury not to consider any evidence relating to the grant money when reaching a verdict.

[¶17] Blunt essentially argues the State is required to prove each and every factual allegation and legal theory precisely as pleaded in the complaint or information, or the defendant is entitled to a judgment of acquittal. This Court, however, "has consistently held the State need not prove every allegation in the complaint or information, but is required to prove

only the elements of the offense charged." *State v. Trosen,* 547 N.W.2d 735, 740 (N.D. 1996); *see also State v. Tranby,* 437 N.W.2d 817, 823 (N.D. 1989) ("[T]he State is not required to prove beyond a reasonable doubt each and every factual allegation set forth in the criminal complaint."). Courts in other jurisdictions have further concluded a trial court has the authority to withdraw from the jury's consideration particular factual issues or legal theories that are not supported by the evidence and submit the remaining factual issues and legal theories to the jury. *See, e.g., Pacheco,* 434 F.3d at 112-14; *United States v. O'Shea,* 426 F.3d 475, 479 n.3 (1st Cir. 2005); *United States v. Burns,* 624 F.2d 95, 104 (10th Cir. 1980); *State v. Mogan,* 627 A.2d 527, 528 (Me. 1993); *State v. Hogan,* 231 N.W.2d 135, 140 (Neb. 1975). Such a ruling merely "narrow[s] the scope of the facts that the jury could find in deciding whether to convict on the offense charged." *Pacheco,* at 114. As explained by the Tenth Circuit Court of Appeals in *Burns*:

> It is clear that a court may withdraw from jury consideration indictment counts unsupported by evidence. The fact that here the court withdrew one of two charges contained in a single count is inconsequential. The controlling principle is that "' . . . a portion of an indictment that the evidence does not support may be withdrawn from the jury, and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense.' (C. Wright, 1 Federal

> Practice and Procedure 274-75 (1969).)" *United States v. Dawson*, 516 F.2d 796 (9th Cir. 1975).

Burns, 624 F.2d at 104-05 (citation omitted).

[¶18] Similarly, in *Hogan*, the Nebraska Supreme Court concluded:

> In this case the court amended count II from a charge of possession of marijuana with intent to deliver, to a charge of simple possession of marijuana. The action, for all practical purposes, withdrew from the jury the issue of whether or not the possession was with intent to deliver. While a court has no power to dismiss a part of an offense or direct a verdict of acquittal on one or more degrees of a crime, an attempt to do so will be treated as withdrawing the issue from consideration by the jury. A trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. Here the evidence did not support the charge of possession of marijuana with intent to deliver and the court was fully justified in withdrawing the issue of intent to deliver from the jury. The offenses involved were based upon the possession of marijuana at a given time and place and the change in the charge could not have created any confusion as to the nature and cause of the accusation nor created any difficulty in defending against it. The action was clearly to the

> defendant's benefit and his contention of error is unsupportable.

Hogan, 231 N.W.2d at 140 (citation omitted).

[¶19] Under analogous circumstances, this Court considered a similar argument in *State v. Morris*, 331 N.W.2d 48 (N.D. 1983). Morris had been charged with possession of marijuana with intent to deliver, and the district court denied his motion for judgment of acquittal under N.D.R.Crim.P. 29. The jury convicted Morris of the lesser-included offense of possession of marijuana. On appeal, Morris argued the district court erred in denying his motion for judgment of acquittal and the case should not have been submitted to the jury. This Court concluded:

> One might wonder what difference it makes whether the trial judge granted or denied Morris's motion for judgment of acquittal with regard to the major offense charged, i.e., possession with intent to deliver, because Morris was not convicted of the major offense charged; he was convicted of the lesser included offense of simple possession. Had we decided that Morris's motion for acquittal of the crime of possession with intent to deliver should have been granted, Morris would have had us use this decision as a premise in a more elaborate argument: namely, once the trial judge decides a jury could not reasonably conclude from the evidence at trial that the accused is guilty of the major offense charged, and therefore the motion for judgment of acquittal should be

> granted, the trial judge should not let the case go to the jury even if there is sufficient evidence for the jury to find the accused guilty of a lesser included offense.
>
> Morris's conception of the procedure a trial judge should follow if a motion for acquittal is granted is not correct.
>
> A trial court's granting of a motion for judgment of acquittal with respect to the major offense charged does not preclude submission of the case to the jury on the basis of the lesser included offense instruction unless, of course, the granting of the motion for acquittal extends to the lesser included offense.
>
> Therefore, even if Morris's motion for judgment of acquittal of the crime of possession with intent to deliver should have been granted, we still would find no reversible error on the trial court's part in submitting Morris's case to the jury because Morris was convicted of the lesser included offense of simple possession and there was sufficient evidence to support a verdict of guilty to the crime of simple possession.

Morris, at 55-56 (citations omitted).

[¶20] The same rationale applies in this case. The district court determined there was insufficient evidence to support one of the underlying factual bases or legal theories in Count I, but there was sufficient evidence to support a verdict of guilty based

upon the remaining factual allegations and legal theories underlying Count I. Rather than submit the unsupported theory to the jury and risk having a verdict that may be based upon an unsupported factual finding, the court merely instructed the jury not to consider evidence of the grant money and removed the issue from the jury's consideration. Under the circumstances in this case, the court's actions were proper and did not require an acquittal on Count I.

III

[¶21] Blunt contends the district court incorrectly instructed the jury on "reasonable doubt" and allowed the jury to convict him on a burden of proof below that which is constitutionally required.

[¶22] The district court gave the pattern jury instruction on reasonable doubt, NDJI Criminal K-1.10 (2004):

> Proof Beyond a Reasonable Doubt
>
> The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. In other words, if you have a reasonable doubt that the Defendant committed the crime, then you must find the Defendant not guilty.
>
> The State is not required to prove guilt beyond all doubt, but beyond a reasonable doubt.

> You should find the Defendant guilty only if you have a firm and abiding conviction of the Defendant's guilt based on a full and fair consideration of the evidence presented in the case and not from any other source.

[¶23] Blunt contends the instruction as given did not specifically inform the jury that the proof required was greater than the preponderance of the evidence standard or the clear and convincing evidence standard, did not define proof beyond a reasonable doubt in terms of possibilities and probabilities, and did not advise the jury it needed to "reach a subjective state of near certitude of the guilt of the accused." He contends the court should have given his requested instruction, which stated:

> Proof Beyond a Reasonable Doubt
>
> "Proof beyond a reasonable doubt" is a higher standard of proof than proof by the "greater weight of the evidence" used in most civil cases, and proof by "clear and convincing evidence" used in civil cases of higher importance such as termination of parental rights or civil commitment. In terms of possibilities and probabilities, you can believe that the accused is possibly or even probably guilty without reaching the very high level of probability of guilt required for proof beyond a reasonable doubt. To reach that level, you need to reach a subjective state of near certitude of the guilt of the accused. To convict, your belief has to be beyond all reasonable doubt.

> On the other hand, the State is not required to prove guilt beyond all doubt. Everything is open to possible or imaginary doubt, or fanciful conjecture. You should not imagine doubt to justify acquittal. A reasonable doubt is one based on reason after you have given full and fair consideration to all the evidence. A reasonable doubt can arise from the evidence itself, from a lack or insufficiency of evidence, or from no evidence proving an essential element of the crime charged.

[¶24] We review jury instructions to determine whether, as a whole, they fairly and adequately advised the jury of the applicable law. *State v. Zajac,* 2009 ND 119, ¶ 12, 767 N.W.2d 825; *State v. Haugen,* 2007 ND 195, ¶ 6, 742 N.W.2d 796; *Hawes v. North Dakota Dep't of Transp.,* 2007 ND 177, ¶ 4, 741 N.W.2d 202. The district court is not required to instruct the jury in the exact language requested by a party if the instructions given are not misleading or confusing, and if they fairly advise the jury of the law on the essential issues of the case. *Zajac,* at ¶ 12; *Haugen,* at ¶ 6; *Hawes,* at ¶ 4.

[¶25] In *State v. Schneider,* 550 N.W.2d 405, 408 (N.D. 1996), we noted we have "long recognized the difficulty in defining reasonable doubt and [have] neither required nor prohibited such a definition." *See also State v. Jahner,* 2003 ND 36, ¶ 14, 657 N.W.2d 266. We have also noted the United States Supreme Court has taken a similar approach:

> The United States Supreme Court has stated "[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska,* 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). "[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (citations omitted).

Jahner, at ¶ 13.

[¶26] In *Schneider,* we thoroughly reviewed various constitutional challenges to the pattern jury instruction on reasonable doubt and concluded that, taken as a whole, the instruction "correctly conveyed the concept of reasonable doubt to the jury" and "informed the jury of the law, without misleading or confusing the jury." *Schneider,* 550 N.W.2d at 410 (quoting *Victor,* 511 U.S. at 22). Blunt has recognized the holding in *Schneider* but asks us to revisit the decision in that case, raising similar challenges to the pattern jury instruction and relying primarily on statements, but not the holding, in *Victor.* We reject the invitation to deviate from the holding and rationale expressed in *Schneider,* and we adhere to the Court's conclusion in that case. We conclude the jury instructions given in this case fairly and adequately advised the jury of the applicable law on the essential

issues of the case, including reasonable doubt, and were not misleading or confusing.

IV

[¶27] Blunt contends the district court erred in allowing the State to aggregate the amounts of the individual instances of misapplication of property alleged in Count I to satisfy the $10,000 threshold for a class B felony under N.D.C.C. § 12.1-23-07(2)(a).

[¶28] Section 12.1-23-07(2), N.D.C.C., provides for grading of misapplication of entrusted property on the basis of the value of the property involved:

> Misapplication of entrusted property is:
>
> a. A class B felony if the value of the property misapplied exceeds ten thousand dollars.
>
> b. A class C felony if the value of the property misapplied exceeds five hundred dollars but does not exceed ten thousand dollars.
>
> c. A class A misdemeanor if the value of the property misapplied exceeds two hundred fifty dollars but does not exceed five hundred dollars.
>
> d. A class B misdemeanor in all other cases.

[¶29] Prior to trial, Blunt moved to bar the State from aggregating the value of multiple instances of

misapplication of property. The district court concluded the aggregation provision contained in the theft grading statute, N.D.C.C. § 12.1-23-05(6), applied. The district court also relied on this Court's holding in *State v. Jelliff*, 251 N.W.2d 1, 7 (N.D. 1977), that the State may elect to charge each misapplication of entrusted property as a separate offense or the State may charge all misapplication of entrusted property as a single offense. Referring to *Jelliff*, the district court concluded on the record, "I think the Supreme Court meant that the State could choose either to do it in a course of conduct and aggregate the offenses or as in this case they could have charged out individual items." The district court allowed the State to charge the multiple instances of misapplication of entrusted property as a single offense and to aggregate the amounts to reach the grading thresholds specified in N.D.C.C. § 12.1-23-07(2).

[¶30] The longstanding holding of this Court in *Jelliff* is dispositive of the issue on appeal. Additionally, the plain language of N.D.C.C. § 12.1-23-07 supports affirming the district court, as does the legislative history.

A

[¶31] This Court's opinion in *Jelliff* is dispositive of this case. *Jelliff* was decided in the immediate aftermath of the 1975 effective date of North Dakota's new Criminal Code and interpreted the specific provision Blunt was convicted of violating, N.D.C.C.

§ 12.1-23-07. Thomas Jelliff was the Grand Forks County state's attorney. He had engaged in a series of transactions diverting funds in an office trust fund to his personal use or benefit. Some of the acts occurred before North Dakota's new Criminal Code became effective on July 1, 1975, and other transactions occurred after that date. Jelliff was charged under the new law, N.D.C.C. § 12.1-23-07, which became effective July 1, 1975. The defendant Jelliff argued that all the acts – all the misapplication of entrusted property – constituted a single offense and that since some of the conduct occurred before the effective date of the statute, the prosecution was impermissible. In essence, Jelliff argued that the misapplication *had* to be charged cumulatively as in this case. Thus disposing of the issue, this Court held the prosecution could *elect* "to prosecute as one offense a continuous series of acts" or could prosecute each act individually. *Jelliff,* 251 N.W.2d at 7. This Court said:

> Although the lower court did not specifically state the basis of its decision to dismiss, we could speculate that the court must have concluded that, *because statutory violations can occur either by single acts or a continuous series of acts,* the prosecution had elected to prosecute as one offense a continuous series of acts and that, therefore, the prosecution is barred because some of the acts in the series occurred prior to the effective date of the statute. We reject this analysis because no such election has been shown and, in fact,

> the complaint alleges only a single statutory violation on or about July 28, 1975.

Id. (emphasis added).

[¶32] Thus this Court held that misapplication of entrusted property could be charged as single acts or as a continuous series of acts. In Blunt's case, the prosecution elected to charge a continuous series of acts. In the Syllabus by the Court, the official holding of the Court under the constitutional provision then in effect, N.D. Const. § 102 (1889), this Court in *Jelliff* held:

> 3. Under the provisions of § 12.1-23-07, NDCC, each misapplication of entrusted property *can* be considered a separate offense.

Id. at 2 (emphasis added). This Court did not say that each misapplication *must* be considered a separate offense. For a third time, this Court in *Jelliff* emphasized the elective nature of the prosecution's decision to prosecute as single acts or as a continuous series of acts:

> A determination that *the statute contemplates a series of transactions exclusively,* rather than single instances of forbidden conduct, would lead to the unreasonable conclusion that anyone who had misapplied entrusted property before the effective date of the statute could, as part of the same series of transactions, continue to violate the statute with impunity after the statute has become effective.

Id. at 7 (emphasis added). Again this Court's opinion emphasizes the elective choice of the prosecution.

[¶33] On the basis of this Court's holding in *Jelliff*, the district court must be affirmed.

B

[¶34] In addition to this Court's holding in *Jelliff*, the plain language of the statutes supports affirming the district court's judgment. The district court did not need to look to N.D.C.C. § 12.1-23-05(6), the aggregation provision contained in the theft grading statute, and the provision on which the dissent focuses, in order to consider the cumulative value of the property misapplied. Even accepting Blunt's position that the section 12.1-23-05(6) aggregation provision does not apply at all to misapplication of entrusted property, the section 12.1-23-07 misapplication offense itself is cumulative and is based on a usually ongoing relationship of trust. Although thefts may be random and unrelated, or part of an ongoing course of conduct, misapplication of entrusted property is predicated on a normally ongoing relationship of trust that relates to property entrusted to the person "as a fiduciary, or in the person's capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution." Section 12.1-23-07, N.D.C.C., provides:

> 1. A person is guilty of misapplication of entrusted property if the person disposes of, uses, or transfers any interest in *property*

that has been entrusted to the person as a fiduciary, or in the person's capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that the person knows is not authorized and that the person knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

2. Misapplication of entrusted property is:

   a. A class B felony if *the value of the property misapplied* exceeds ten thousand dollars.

   b. A class C felony if *the value of the property misapplied* exceeds five hundred dollars but does not exceed ten thousand dollars.

   c. A class A misdemeanor if *the value of the property misapplied* exceeds two hundred fifty dollars but does not exceed five hundred dollars.

   d. A class B misdemeanor in all other cases.

N.D.C.C. § 12.1-23-07 (emphasis added).

[¶35] By definition, the offense is based on a *relationship* of trust. The plain language of the grading provisions encompasses the property misapplied. "Property" encompasses both the singular and the plural. The North Dakota Century Code itself

instructs in the rules for interpreting the code that "[w]ords used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears." N.D.C.C. § 1-01-35. There is no contrary intent that appears. The plain language of the statute relates to "the value of the property misapplied," not to each item of property misapplied. The plain language of N.D.C.C. § 12.1-23-07 encompasses the value of the property Blunt misapplied – not the value of each individual item of property Blunt misapplied. A contrary result would require reading into the statute words – "each item of" – that are not there, and would require ignoring the ongoing relationship of trust.

C

[¶36] In addition to this Court's dispositive decision in *Jelliff* and the further support of the plain statutory language, the legislative history is also supportive. Nowhere does the legislative history state that each item of property misapplied must be individually charged.

[¶37] Although the legislative history offers support for the premise that the aggregation provision of N.D.C.C. § 12.1-23-05(6) applies to N.D.C.C. § 12.1-23-07, as the district court said, that is not particularly important to the resolution of this case. More importantly, in 1989, when the legislature added graduated penalties for misapplication of entrusted

property, *State v. Jelliff* had long been decided. And the legislature is presumed to have been aware of this Court's opinion in *Jelliff* that the prosecution could elect to charge misapplication of entrusted property either as single acts or as a series of acts. *See, e.g., City of Bismarck v. Uhden*, 513 N.W.2d 373, 376 (N.D. 1994) (stating that where courts of North Dakota have construed a statute and the construction is supported by long acquiescence on the part of the legislature, it is presumed that the interpretation of the statute is in accordance with legislative intent). Nothing in the 1989 legislative history reflects any intent that each instance of misapplication must be separately charged. *See* 1989 N.D. Sess. Laws ch. 167, § 1 (adding the grading provisions to N.D.C.C. § 12.1-23-07); *Hearing on H.B. 1059 Before the House Judiciary Comm.*, 51st N.D. Legis. Sess. (Jan. 10, 1989) (stating the bill provided for additional classifications for the grading of misapplication of entrusted property, but making no reference to separately charging each instance of misapplication); *Hearing on H.B. 1059 Before the Senate Judiciary Comm.*, 51st N.D. Legis. Sess. (Feb. 21, 1989) (same); *Report of the N.D. Legis. Council* 160-61 (1989) (reporting the committee recommended the amendment to provide for additional classifications for the grading of misapplication of entrusted property, but making no reference to separately charging each instance of misapplication); *Minutes of Interim Law Enforcement Comm.* (June 23, 1987; Oct. 20, 1987; Jan. 12, 1987; May 10, 1988; and Sept. 23, 1988) (reflecting the bill was introduced as part of

the effort to provide protective services to vulnerable adults).

D

[¶38] As this Court said in *Jelliff*:

> We have held repeatedly that statutes must be construed to avoid ludicrous and absurd results, and that courts endeavor to construe statutes so as to effectuate the legislative purposes which prompted their enactment. *Certainly a construction of a criminal statute which nullifies its punitive provisions contravenes the purpose of the enactment and leads to illogical and absurd results.*

251 N.W.2d at 7 (citations omitted) (emphasis added).

[¶39] Section 12.1-23-07, N.D.C.C., misapplication of entrusted property, under this Court's holding in *Jelliff*, under the plain language of the statute, and under legislative acquiescence in its subsequent enactment, permits consideration in a single count all the property misapplied. The evidence presented here supports the jury's verdict that the value of the property misapplied by Blunt exceeded $10,000.

V

[¶40] We have considered the remaining issues and arguments raised by the parties and find them to be either unnecessary to our decision or without merit. We affirm the order deferring imposition of sentence.

[¶41] Dale V. Sandstrom
Daniel J. Crothers
Mary Muehlen Maring
Kirk Smith, S.J.

[¶42] The Honorable Kirk Smith, Surrogate Judge, sitting in place of Kapsner, J., disqualified.

VandeWalle, Chief Justice, concurring and dissenting.

[¶43] I concur in Parts I, II and III of the majority opinion. Because I do not agree that *State v. Jelliff*, 251 N.W.2d 1 (N.D. 1977), controls our decision and because I read the legislative history of N.D.C.C. ch. 12.1-23 differently than does the majority, I respectfully dissent to Parts IV and V of the majority opinion.

[¶44] The State contends, and the district court concluded, that the aggregation provision contained in the theft grading statute, N.D.C.C. § 12.1-23-05(6), applies and allows the State to charge multiple instances of misapplication of entrusted property as a single offense and aggregate the amounts to reach the grading thresholds specified in N.D.C.C. § 12.1-23-07(2). The statute relied upon by the State and the district court provides:

> For purposes of grading, the amount involved in a theft under this chapter shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which

> were stolen by the actor, or which the actor believed that the actor was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense.

N.D.C.C. § 12.1-23-05(6). The district court concluded that the language "under this chapter" in the first sentence of N.D.C.C. § 12.1-23-05(6) indicated the legislature intended the subsection to apply to all offenses in N.D.C.C. ch. 12.1-23, including misapplication of entrusted property.

[¶45] The rationale employed by the district court is incomplete and ignores other language in the statute. Section 12.1-23-05(6) does not say that it applies to all offenses under chapter 12.1-23; it expressly applies to "*theft* under this chapter" and only allows "amounts proved to have been *stolen*" to be aggregated. N.D.C.C. § 12.1-23-05(6) (emphasis added). The legislature has defined "stolen" for purposes of N.D.C.C. ch. 12.1-23:

> "Stolen" means property which has been the subject of theft or robbery or a vehicle which is received from a person who is then in violation of section 12.1-23-06.

N.D.C.C. § 12.1-23-10(11). Thus, the critical question is whether misapplication of entrusted property

under N.D.C.C. § 12.1-23-07 constitutes "theft" as required by N.D.C.C. § 12.1-23-05(6).

[¶46] Chapter 12.1-23, N.D.C.C., was part of the criminal code originally adopted in 1973. *See* 1973 N.D. Sess. Laws ch. 116, § 22; *State v. Ensz*, 503 N.W.2d 236, 238 (N.D. 1993). The consolidation of numerous theft offenses was described as "one of the most radical changes in current North Dakota law" in the proposed new criminal code. *Minutes of Interim Comm. on Judiciary "B"* 36 (June 20-21, 1972); *see Ensz*, at 238. The legislature took the unusual step of enacting an expression of legislative intent explaining its consolidation of previously recognized theft offenses into three specific code sections, N.D.C.C. §§ 12.1-23-02, -03, and -04:

> Conduct denominated theft in sections 12.1-23-02 to 12.1-23-04 constitutes a single offense designed to include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, misappropriation of public funds, swindling, and the like.

N.D.C.C. § 12.1-23-01(1); *see Minutes of Interim Comm., supra*, at 36 (Section 12.1-23-01(1) "provides that the theft offenses are to be construed as consolidating the numerous separate offenses previously known in the criminal law, i.e., this section provides a statement of 'legislative intent'"). This statutory expression of legislative intent, coupled with the

recognition in the minutes of the interim committee that N.D.C.C. §§ 12.1-23-02, -03, and -04 consolidated the theft offenses "previously known in the criminal law," strongly suggests that the legislature intended those three code sections to encompass all theft offenses under the North Dakota Century Code and that misapplication of entrusted property under N.D.C.C. § 12.1-23-07 is not theft.

[¶47] A broader review of the legislative history and policy underpinnings of N.D.C.C. ch. 12.1-23 further supports this conclusion. Chapter 12.1-23, as originally enacted in 1973, was derived from the proposed Federal Criminal Code. When confronted with a question of statutory interpretation, we are thus guided by the drafters' official comments to the proposed Federal Criminal Code and the relevant legislative history, including the *Working Papers of the National Commission on Reform of Federal Criminal Laws* (1970) ("*Working Papers*"). *State v. Stensaker,* 2007 ND 6, ¶ 9, 725 N.W.2d 883; *State v. Knowels,* 2002 ND 62, ¶ 9, 643 N.W.2d 20. The official commentary to the proposed Federal Criminal Code and the *Working Papers* are persuasive in interpreting the intent of our criminal code when the North Dakota statute does not vary in substance from its federal counterpart. *See State v. Beciraj,* 2003 ND 173, ¶ 15, 671 N.W.2d 250; *Knowels,* at ¶ 9.

[¶48] The drafters of the proposed Federal Criminal Code unequivocally indicated that misapplication of entrusted property was not theft under the Code.

Addressing the federal provision on misapplication of entrusted funds, the drafters explained:

> *Misapplication of Property.* – The offense proposed in section 1737 involves one who deals with entrusted property in an unauthorized manner that exposes the property to a risk of loss. This offense is the second step in the three-tiered approach suggested by the theft materials for the problems posed by the mishandling of funds by public employees.
>
> The first step involves the offense of theft, and in particular the definition of "deprive," which provides that an employee "deprives" the government of property if he disposes of it in a manner such as to make its restoration, in fact, unlikely. This was supplemented by the provision that a failure to account upon demand amounts to a prima facie case of theft.
>
> The second step – taken by proposed section 1737 – is to treat as a misdemeanor any disposition of entrusted property that is not authorized and that at the same time exposes the property to a risk of loss or detriment. The idea is thus that a theft is made out if the actor uses or disposes of entrusted property in a manner that involves a loss of his control over its use. The misdemeanor of misapplication is made out if his use or disposition of the property does not involve a loss of control, but on the other hand does involve exposure of the property to a risk of loss.

> The third step, is to rely on various regulatory offenses involving breach of duty with regard to entrusted funds. Thus, for example, depositing money in an authorized depositary could subject the employee to serious sanctions of a civil nature, but would not become truly criminal unless the offenses of misapplication or theft could be made out. It is believed that this three-tiered approach, described more fully in the commentary to the theft proposal, more accurately poses the significant issues on which the degree of criminal liability should turn, while at the same time retaining the salutary deterrent effect of the present law.

II *Working Papers,* at 974 (citations and footnote omitted); *see also* Final Report of the National Commission on Reform of Federal Criminal Laws 205, Introductory Note to Theft and Related Offenses (1971) ("Final Report"); Final Report 212-13, Comment to § 1737; II *Working Papers,* at 920-21, 930-31. As noted by the drafters, "there are a number of existing Federal statutes that include . . . forms of diversions or loss of property that cannot properly be denominated 'theft'" including "statutes which speak of the 'misapplication' or 'use' of property." II *Working Papers,* at 930. These comments clearly evince the drafters' intent that theft and misapplication of entrusted property were entirely separate and distinct offenses, and I conclude that when our legislature enacted the theft and misapplication of entrusted property provisions of the proposed Federal Criminal Code in 1973 it acted with the same intent. *See*

Stensaker, 2007 ND 6, ¶ 9, 725 N.W.2d 883; *Beciraj*, 2003 ND 173, ¶ 15, 671 N.W.2d 250; *Knowels*, 2002 ND 62, ¶ 9, 643 N.W.2d 20.

[¶49] The clear distinction between theft and misapplication of entrusted property embodied in the proposed Federal Criminal Code is particularly significant when considering application of the theft grading statute. In their Introductory Note to the Theft and Related Offenses section of the proposed Federal Criminal Code, the drafters expressly noted that the theft grading provision, § 1735, "deal[t] with theft only." Final Report 205, Introductory Note to Theft and Related Offenses. Thus, the drafters clearly demonstrated their intent that the theft grading provision, including the aggregation provision, did not apply to misapplication of entrusted property.

[¶50] In the theft grading provision in the proposed Federal Criminal Code, the statute does not include the language "theft under this chapter," but refers specifically to the theft provisions by section number:

> Valuation. For purposes of grading, the amount involved in a theft under sections 1732 to 1734 shall be the highest value by any reasonable standard. . . . Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense.

Final Report § 1735(7). Sections 1732 to 1734 of the proposed Federal Criminal Code were adopted as N.D.C.C. §§ 12.1-23-02, -03, and -04. When the new criminal code was adopted in this state in 1973, the legislature substituted the phrase "theft under this chapter" in place of the specific federal sections listed in the first sentence of the federal provision. There is no indication in the state legislative history that this was intended as a substantive change, but appears merely to be an attempt to conform the statute to the structure and format of the North Dakota Century Code. Given the clear direction in the federal history that misapplication of entrusted property was not theft and that the theft grading provision applied to "theft only," I do not believe the legislature intended the theft grading provision to apply to the misapplication of property statute when it enacted N.D.C.C. ch. 12.1-23 in 1973.

[¶51] Furthermore, any question about the legislature's intent is resolved when one considers the language of the misapplication of entrusted property statute as enacted in this state in 1973. As originally enacted, misapplication of entrusted property was always a class A misdemeanor – there was no grading of the offense based upon value of the property:

> 12.1-23-07. MISAPPLICATION OF ENTRUSTED PROPERTY.) A person is guilty of a class A misdemeanor if he disposes of, uses, or transfers any interest in, property which has been entrusted to him as a fiduciary, or in his capacity as a public servant or an

> officer, director, agent, employee of, or a person controlling a financial institution, in a manner that he knows is not authorized and that he knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

1973 N.D. Sess. Laws ch. 116, § 22. Under this provision, any misapplication of entrusted property, whether ten dollars or ten thousand dollars, was a class A misdemeanor. Thus, the aggregation provision of the theft grading statute clearly had no application to misapplication of entrusted property because the value of the property was wholly irrelevant. Accordingly, when the legislature enacted the theft grading statute, including the language "theft under this chapter" in N.D.C.C. § 12.1-23-05(6), it could not have intended the aggregation provision would apply to misapplication of entrusted property under N.D.C.C. § 12.1-23-07.

[¶52] The legislature's 1989 amendment of N.D.C.C. § 12.1-23-07, which added the grading thresholds for misapplication of entrusted property, does not indicate any intent to make the theft grading aggregation provision in N.D.C.C. § 12.1-23-05(6) applicable to misapplication of entrusted property, and in fact demonstrates the opposite. The 1989 amendment of N.D.C.C. § 12.1-23-07 arose from an interim study on adult protective services by the Legislative Council. *See* Report of the North Dakota Legislative Council to the Fifty-first Legislative Assembly 160-61 (1989)

("Legislative Council Report"). In response to concerns that classification of the offense of misapplication of entrusted property as a class A misdemeanor did not provide a meaningful penalty in cases where entrusted property of substantial value belonging to a vulnerable adult was misapplied, the legislature deleted the language making misapplication of entrusted property a class A misdemeanor and enacted separate grading classifications for that offense. *See* 1989 N.D. Sess. Laws ch. 167, § 1; N.D.C.C. § 12.1-23-07. The legislature's action, and the legislative history of the 1989 amendment, demonstrate the legislature did not intend the aggregation provision in N.D.C.C. § 12.1-23-05(6) to apply to misapplication of entrusted property.

[¶53] The legislative history indicates the legislature was well aware of the historical distinctions between theft and misapplication of entrusted property under the state and proposed federal codes. The history expressly notes the three-tiered approach embodied in the proposed Federal Criminal Code, including the clear distinction between theft and misapplication of entrusted property:

> According to the final report of the National Commission on Reform of Federal Criminal Laws, from which the North Dakota Criminal Code was derived, the offense of misapplication of entrusted property is part of a three-step approach to the problems posed by the mishandling of property by persons in a fiduciary relationship. The first step in the

> approach taken in the proposed federal code and the North Dakota Criminal Code is to define "deprived," a key element in the offense of theft but not an element of the offense of misapplication of entrusted property, to include only those misapplications of property in which restoration of the property is unlikely. The offense of misapplication of entrusted property constitutes the second step in this approach to mishandling of property by persons in a fiduciary relationship in that any disposition of entrusted property which is not authorized and which exposes the property to a risk of loss or detriment is treated as a misdemeanor. The third step in the approach provides that any other breach of duty with regard to entrusted property, regardless of risk of loss, be treated as a regulatory offense outside the Criminal Code.

Legislative Council Report, at 161.

[¶54] Perhaps the clearest indication of the legislature's intent arises from the fact that it adopted a separate grading provision for misapplication of entrusted property expressly based upon the theft grading provision, but did not incorporate an aggregation provision similar to N.D.C.C. § 12.1-23-05(6). The grading threshold amounts in N.D.C.C. § 12.1-23-07(2) replicate the thresholds encompassed in N.D.C.C. § 12.1-23-05, and the legislative history of the 1989 amendment expressly notes that the property value thresholds set forth for the various levels of offenses "generally follow the classifications used for

the grading of theft offenses under NDCC Section 12.1-23-05." Legislative Council Report, at 161. Yet when the legislature expressly engrafted the same dollar value thresholds in subsections (1), (2), (3), and (4) of N.D.C.C. § 12.1-23-05 into a separate grading provision for misapplication of entrusted property in N.D.C.C. § 12.1-23-07(2), it did not include an aggregation provision similar to N.D.C.C. § 12.1-23-05(6). It is a fundamental rule of statutory construction that "[i]t must be presumed that the Legislature intended all that it said, and that it said all that it intended to say." *State v. Dennis*, 2007 ND 87, ¶ 12, 733 N.W.2d 241 (quoting *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993)); *see also Simon v. Simon*, 2006 ND 29, ¶ 17, 709 N.W.2d 4; *Public Serv. Comm'n v. Wimbledon Grain Co.*, 2003 ND 104, ¶ 28, 663 N.W.2d 186; *State v. Myers*, 73 N.D. 687, 710, 19 N.W.2d 17, 29 (1945) ("The Legislature must be presumed to have meant what it said, and all that it said, and nothing else."). The legislature's decision to adopt a separate grading provision in N.D.C.C. § 12.1-23-07(2) based upon N.D.C.C. § 12.1-23-05, without incorporating an aggregation provision, is a clear indication that the legislature did not intend to allow the amounts of multiple offenses to be aggregated to reach the grading thresholds in N.D.C.C. § 12.1-23-07(2).

[¶55] Nor do I believe this Court's decision in *State v. Jelliff* is controlling. In *Jelliff* the issue before the Court was whether the alleged acts of misapplication of entrusted property which occurred before July 1, 1975, the effective date of N.D.C.C. § 12.1-23-07, was

cause to dismiss the entire criminal complaint which contained allegations of misapplication both before and after July 1, 1975. The Court concluded, as I have concluded, that each misapplication of entrusted property can be considered a separate offense. The issue before the Court did not involve the grading of those separate offenses and the opinion of the Court contained no discussion of the legislative history of the relevant statutes which had been enacted and became effective during the time of the alleged violations.

[¶56] I recognize that my construction of the statute may appear somewhat unwieldy in a case such as this, where there are literally dozens of alleged instances of misapplication of entrusted property. Our prior caselaw makes it clear, however, that the State need not prove a series of transactions to establish the offense, and each individual misapplication of entrusted property constitutes a completed statutory offense. *Jelliff,* 251 N.W.2d at 7. While valid public policy reasons may exist for allowing aggregation of the value of multiple misapplications of entrusted property, such determinations of policy are for the legislature, not the courts. *E.g., Doyle v. Sprynczynatyk,* 2001 ND 8, ¶¶ 14, 17, 621 N.W.2d 353. The primary goal when construing a statute is to ascertain the intent of the legislature. *E.g., Nelson v. Johnson,* 2010 ND 23, ¶ 12; *State v. Brown,* 2009 ND 150, ¶ 15, 771 N.W.2d 267. It is for the legislature to amend a statute if the language of the statute does not accurately reflect the legislature's intent; the duty

of the judiciary is to simply enforce the law as it exists. *Olson v. Workforce Safety & Ins.*, 2008 ND 59, ¶ 23, 747 N.W.2d 71.

[¶57] One final consideration factors into our interpretation of the statutes at issue in this case. This Court has repeatedly cautioned that criminal statutes are to be strictly construed in favor of the defendant and against the government. *See, e.g., State v. Corman*, 2009 ND 85, ¶ 15, 765 N.W.2d 530; *State v. Geiser*, 2009 ND 36, ¶ 16, 763 N.W.2d 469; *Dennis*, 2007 ND 87, ¶ 12, 733 N.W.2d 241. Interpreting the various provisions in N.D.C.C. ch. 12.1-23 in light of their legislative history, and construing them strictly in favor of the defendant and against the government, I conclude that the aggregation provision in the theft grading statute, N.D.C.C. § 12.1-23-05(6), does not apply to the offense of misapplication of entrusted property, and the amounts of multiple instances of misapplication of entrusted property may not be aggregated to reach the grading thresholds set out in N.D.C.C. § 12.1-23-07(2).

[¶58] Because I believe the district court erred in holding that N.D.C.C. § 12.1-23-05(6) applied and allowed the jury to aggregate the amounts of multiple instances of misapplication of entrusted property, it is necessary to consider the effect of this error upon the jury verdict and the appropriate remedy on appeal.

[¶59] The only allegation of misapplication of entrusted property in Count I that individually totaled more than $10,000 was the grant money allegation.

As the majority notes, the district court instructed the jury it was not to consider evidence of the grant money in reaching its verdict. A jury is presumed to follow the instructions given by the court. *E.g., State v. Stridiron,* 2010 ND 19, ¶ 8; *State v. Paul,* 2009 ND 120, ¶ 27, 769 N.W.2d 416; *State v. Kruckenberg,* 2008 ND 212, ¶ 24, 758 N.W.2d 427.

[¶60] I therefore presume that the jury found Blunt had committed multiple instances of misapplication of entrusted property and aggregated the amounts to find him guilty of a class B felony under N.D.C.C. § 12.1-23-07(2)(a). The remaining allegations urged by the State in support of Count I were numerous instances of gift certificates purchased for WSI employees; food, beverages, flowers, balloons, decorations, costume rentals, ornaments, and employee gifts for WSI meetings; food and convention expenses for legislators; sick leave paid to a WSI executive; and failure to recoup relocation expenses owed by a WSI executive. The jury returned a general verdict finding Blunt guilty on Count I. Thus, the jury had to have found the seven elements of the statutory offense had been proven. *See Blunt,* 2008 ND 135, ¶ 7, 751 N.W.2d 692; *Barendt,* 2007 ND 164, ¶ 10, 740 N.W.2d 87. I have no way of discerning, however, which allegations the jury believed and how it arrived at an amount misapplied in excess of $10,000. In short, the jury found Blunt had on multiple occasions misapplied entrusted property, but I cannot point to any single item with a specific dollar amount that the jury relied upon.

[¶61] The grading provision in N.D.C.C. § 12.1-23-07(2) sets various thresholds based upon the value of the property misapplied: a class B felony if the value exceeds $10,000, a class C felony for $500 to $10,000, a class A misdemeanor for $250 to $500, and a class B misdemeanor "in all other cases." Because the jury should not have been allowed to aggregate the amount of multiple offenses, and because I cannot discern with certainty that the jury found any single misapplication of property valued in excess of $250, I conclude the appropriate remedy on appeal is to consider this offense as falling within "all other cases" under N.D.C.C. § 12.1-23-07(2)(d) and to treat the jury's verdict as a finding of guilt of a single instance of misapplication of entrusted property in an amount less than $250, a class B misdemeanor. I would therefore reverse the order deferring imposition of sentence based upon a class B felony and remand with directions that the jury verdict be treated as a finding of guilt of a class B misdemeanor.

[¶62] Gerald W. VandeWalle, C.J.

STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF BURLEIGH **Case No. 08-07-K-789**

State of North Dakota,
Plaintiff,
vs.
Charles Blunt,
Defendant.

Order On Motion for Acquittal and to Set Aside the Jury Verdict

Defendant, Blunt, moves the Court to enter an Acquittal and set aside the Jury Verdict of Guilty to Count I rendered by the jury in this matter. The State obviously resists the motion. At the center of Blunt's argument is Count I, which charges a class B Felony misapplication of government property. Through the preliminary hearing and a subsequent response to a request for a bill of particulars the State outlined a number of different expenditures authorized by Blunt such as relocation expenses, sick leave, conference expenditures, prizes for employees, and designation of monies to a North Dakota's Firefighters Association fund. At the end of the State's case Blunt made a Rule 29 motion for acquittal. The Court on this motion found the State had not provided sufficient evidence regarding the fireman's fund allegation to allow that portion of the charge to go to the jury considering the evidence in the light most favorable to the State. The other categories of expenditures had sufficient evidence to go before the jury. The Court

was faced with the problem of the State having lumped these different categories into a single charge. The Court needed to protect Blunt from the jury possibly using that portion of the charge, that if charged in its own count, would by the Court's finding have been subject to acquittal by the Court. The Court granted Blunt's Rule 29 on Count I as it pertains to the Fireman's fund only. The Court proceeded to explain to the jury in closing instructions that they could not consider evidence regarding the firemen's fund in arriving at their verdict. Now Blunt argues because the Court granted the Rule 29 to a portion of the charge the whole charge must be acquitted by the Court not withstanding there was ample evidence to go forward on the other alleged misappropriations to the point the jury found Blunt guilty of the offense without considering the firemen's fund portion of the charge.

Blunt relies on *Sanabria v. United States*, 437 U.S. 54 (1978), where the trial Court dismissed the numbers betting portion of a alleged gambling business indictment and acquitted *Sanabria* of the horse betting portion of the single count indictment. The Government in Sanabria wanted to retry the case as to the numbers betting portion and the Supreme Court determined that he could not be retried on the same offense for which he was acquitted. In the Blunt trial the information simply charges a misapplication of government funds in excess of $10,000. Through the preliminary hearing and the subsequent response to a request for a bill of particulars the different

allegations were disclosed. The Blunt matter is similar in that the case involves the one single charge, yet it differs in that the Court granted an acquittal to only a portion of the offense and then proceeded to allow the jury to come to a verdict on all the other portions of the one offense charged. Unlike *Sanabria,* Blunt is protected from a retrial of his alleged misuse of funds in allocating monies to the North Dakota Firefighters Association. Blunt was protected from the jury wrongly using this portion of the evidence in obtaining a verdict. This Court is unable to find how Blunt is damaged by the Court's finding there was insufficient evidence to proceed on the North Dakota Firefighters Association portion of the allegation. Blunt's right to a fair trial was protected rather than violated by the Court's actions.

The Court denies Blunt's request for an acquittal.

February 3, 2009.

BY THE COURT:

/s/ Bruce A. Romanick
Bruce A. Romanick
District Judge

xc: Feland
Hoffman

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota,
Plaintiff,
vs.
Charles Blunt,
Defendant.

Case No. 07-K-789

Volume I

TRANSCRIPT OF

JURY TRIAL

Before
The Honorable Bruce A. Romanick
District Judge

Monday, December, 15, 2008
Burleigh Courthouse
Bismarck, North Dakota

APPEARANCES:

FOR THE PLAINTIFF:

MS. CYNTHIA FELAND, and
MR. LLOYD SUHR, Assistant
Burleigh County State's Attorneys
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, North Dakota 58501

FOR THE DEFENDANT:

MR. MICHAEL HOFFMAN
Attorney at Law
120 North Third Street
PO Box 1056
Bismarck, North Dakota 58502-1056

* * *

[12] MR. HOFFMAN: I need to take exception to the [13] denial of Defendant's requested Jury instruction numbers 16 and 17.

THE COURT: Those are noted. The Court does have instructions that Mr. Hoffman submitted. The Court used the pattern jury instructions in regard to proof beyond a reasonable doubt.

* * *

[15] THE COURT:

* * *

Members of the Jury,

* * *

[18] Defendant is presumed to be innocent unless the contrary, the Defendant's guilt, is proved beyond a reasonable doubt. If the State has not proved the Defendant's guilt beyond a reasonable doubt, you must find the Defendant not guilty.

The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. In other words, if you have a reasonable doubt that the Defendant committed the crime, then

you must find the Defendant not guilty. The State is not required to prove guilt beyond all doubt, but beyond a reasonable doubt. You should find the Defendant guilty only if you have a firm and abiding conviction of the Defendant's guilt based on a full and fair consideration of the evidence presented in the case and not from any other source.

* * *

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota,
Plaintiff,
vs.
Charles Blunt,
Defendant.

Case No. 07-K-789
Volume III

TRANSCRIPT OF

JURY TRIAL

Before
The Honorable Bruce A. Romanick
District Judge

Wednesday, December, 17, 2008
Burleigh Courthouse
Bismarck, North Dakota

APPEARANCES:

FOR THE PLAINTIFF:

MS. CYNTHIA FELAND, and
MR. LLOYD SUHR, Assistant
Burleigh County State's Attorneys
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, North Dakota 58501

FOR THE DEFENDANT:

MR. MICHAEL HOFFMAN
Attorney at Law
120 North Third Street
PO Box 1056
Bismarck, North Dakota 58502-1056

* * *

[741] MR. HOFFMAN: * * * I make a motion for judgment of acquittal.

* * *

[755] THE COURT: * * * [756] The grant program. I guess, I'm not pausing because I – I honestly can't see where the issue lies, so I'm going to find that – I'm going to grant the motion in regards to the grant program. We'll have to figure out how to address that. But that amount will not be considered by the Jury, as I'm going to dismiss [757] that portion of the allegation, is one way to put it, I guess.

* * *

So, I guess, I don't – I'm finding there is insufficient evidence for that portion of it to go to the Jury. But everything else is going to stay. So simply, that portion will be out. But we'll go forward on the others with that, then.

* * *

[759] MS. FELAND: Well, I guess, just for my understanding, here's part of the conflict I'm running with. I mean, when you look at a Rule 29, the rule is, is a count out, is a count in, is there

sufficient evidence for that count to go forward? It isn't really a situation where you can pick and choose and say, you know what, I find this evidence credible. I don't find this other evidence credible. I mean, it's all part and parcel of one charge. They're not separate and individual charges. They are all part of one.

So, I guess, my question for the Court is, you know, on what basis you can take the position that certain pieces of evidence are not going to be able to be considered by the Jury? And I say that because, again, it's all charged as an ongoing course of conduct that happened within a specific period of time. And so when you do that, I don't know how you can pick and choose pieces of evidence.

And, same as Mr. Hoffman, they have to [760] unanimously decide that there is $10,000 in this case for Count I that they believe was misappropriated or disposed of, transferred by Mr. Blunt. And that's explicit within there. I mean, it's like we're creating some additional parameters that, I guess, I don't know under what rule of law we're looking at.

THE COURT: Well, what he's commenting on is, you've done phases here. You have sick leave and relocation. If they buy off on both of those dollar amounts over $10,000, end of story.

MS. FELAND: Right.

THE COURT: But if they don't buy off on relocation and they buy off on sick leave –

MS. FELAND: Uh-huh.

THE COURT: – and then we don't know what they did or didn't believe about meeting expenses and gift expenses.

MS. FELAND: Well, I understand. But when it's all charged, Your Honor, as part of one count, it is one count. Just like if you have multiple items of property that are stolen. It's the same thing. I mean, if you have somebody that you know goes in and –

THE COURT: Well, hang on. Put your argument together. You're on notice that it's going to come up. I want to get to the Jury. I mean, it's going to come [761] up. It's been brought up by Mr. Hoffman already, and it does leave an issue possibly out there that they could come back finding him guilty, and the way they're set up now, it just says guilty or not guilty of spending over $10,000. Whether Mr. Hoffman's correct, saying that they've got to have something of unanimity with regard to sick leave, relocation, meeting expenses, gift, you know, is a question, and one that needs to be answered.

If that's – if you're going to toe the line and just say, we don't agree with that. Fine. That's your – that's where I'm at. But Mr. Hoffman brought up a point. I'm going to look into it. So I'm giving you an opportunity. You know, I know the laws. I know them, but this is different because of these – how everything is lined out, how you have one charge, but yet it's not like we have ten Camaros that are charged and what is the value of each one. We have got different

offenses that are going to come up. We have got different offers of proof of different counts.

I'm just saying it's a concern I have. Obviously, it's been brought up by Mr. Hoffman. So, you know, I might in the end say, no, we're as we are, but he's going to, obviously, put something together and we'll have to go roll from there.

[762] MS. FELAND: I guess, I bring that up, too, Your Honor –

THE COURT: I understand on your grant program.

MS. FELAND: Right.

THE COURT: But, guess what, that's the way it is. I mean, I don't think you proved that portion of it. You charge it out that way. If I say, oh, that can go forward, too, where am I at when they come back guilty? You've alleged $150,000 that was committed, never spent, never anything, and I get a Jury that can say, oh, golly, we're out $150,000, when the State's actually only out $15,000 at this point.

MS. FELAND: I understand.

THE COURT: So I think it's appropriate and it's carved out of there. I'm going to say they can't consider that amount, whether it be 15, 74 or 150 in coming to a conclusion on Count I.

MS. FELAND: So then am I under the understanding it is part of the Court's ruling, since the Court has said that there will be no comment

about that, that includes comments from either side? So there is no discussion about the grants for all practical purposes, as if it never existed as part of this charge. Is that what I'm understanding?

[763] THE COURT: It is going to be in the closing instructions that they can't consider those amounts. So there shouldn't be any more argument about it.

MS. FELAND: Okay.

THE COURT: It's like it was a separate count, so to speak, and it's been dismissed. And I have to explain it to the Jury, obviously, because they have heard evidence. So that's what I'll do.

* * *

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT
State of North Dakota, Plaintiff, vs. Charles Blunt, Defendant.	Case No. 07-K-789 **Volume IV**

TRANSCRIPT OF

JURY TRIAL

Before
The Honorable Bruce A. Romanick
District Judge

Thursday, December, 18, 2008
Burleigh Courthouse
Bismarck, North Dakota

APPEARANCES:

FOR THE PLAINTIFF:

MS. CYNTHIA FELAND, and
MR. LLOYD SUHR, Assistant
Burleigh County State's Attorneys
Burleigh County Courthouse
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Bismarck, North Dakota 58501

FOR THE DEFENDANT:

MR. MICHAEL HOFFMAN
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* * *

[913] MR. SUHR: Your Honor, I guess, Ms. Feland and I did discuss with respect to the Rule 29 issue that was brought up yesterday on the grants. With respect, just to build a record on this and for whatever consideration you will then give it.

If you read Rule 29, it talks about granting or denying a Rule 29 with respect to an offense. And that would mean granting or dismissing based upon Count I as a whole, or Count II as a whole, rather than partial, I guess, dismissal of a specific factual theory available for the Jury to consider in support of one count.

It's analogous, if you will, to a conspiracy charge where there are multiple overt acts that are alleged in support of the conspiracy. The Defense could argue that one or more of those overt acts lacks sufficient factual strength to support a conviction. But that doesn't mean that you would then pull that factual theory out of the case for consideration by the Jury.

In essence, it treats a Rule 29 as de facto [914] motion to suppress facts in evidence rather than a view of whether sufficient evidence has been presented

to bring an offense forward. And I think the use of the word "offense" in Rule 29, makes it specific that it's the count, it's the charge, not any one specific factual line of thought within the charge.

And the Court, having found there to be sufficient factual evidence with respect to all but the grant expenses, I think that requires it be taken forward. And I just wanted to put that onto the record.

THE COURT: All right. It's on the record. I disagree. If you brought a conspiracy charge before the Court and you allege certain overt acts and were unable to prove those overt acts, I would instruct the Jury they can't consider them so there wasn't any confusion as to those overt acts, which I think is appropriate here that they can't consider that money, because I'm not indicating there was a defense to it, I'm indicating there is insufficient evidence to go before the Jury to find a conviction on the Firemens Fund grant program as an offense. And that's how I'm going to rule. And I'm going to issue an instruction along those lines that they are not to consider that in considering Count I.

[915] MR. HOFFMAN: Well –

THE COURT: Comments, Mr. Hoffman?

MR. HOFFMAN: Well, my understanding is you granted the motion that was made under Rule 29. Correct?

THE COURT: Correct.

MR. HOFFMAN: Well, given what the State just said, then Mr. Blunt is not guilty of Count I at this point in time, and I would move that we not proceed on Count I whatsoever.

THE COURT: Understand. Not going to happen. It's just like I just informed, so we'll go on.

* * *

Proof Beyond a Reasonable Doubt

The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. In other words, if you have a reasonable doubt that the Defendant committed the crime, then you must find the Defendant not guilty.

The State is not required to prove guilt beyond all doubt, but beyond a reasonable doubt.

You should find the Defendant guilty only if you have a firm and abiding conviction of the Defendant's guilt based on a full and fair consideration of the evidence presented in the case and not from any other source.

* * *

State v. Jahner, 2003 ND 36, 657 NW2d 266
State v. Schneider, 550 NW2d 405 (ND 1996)
State v. Azure, 525 NW2d 654 (ND 1994)
City of Minot v. Rubbelke, 456 NW2d 511 (ND 1990)
State v. Liberman, 229 NW 363 (ND 1930)
State v. Bancroft, 137 NW 37 (ND 1912)
State v. Montgomery, 83 NW 873 (ND1900)

Victor v. Nebraska, 511 US, 114 SCt 1239, 127 LEd2d 583 (1994)
Sullivan v. Louisiana, 508 US 275, 113 SCt 2078, 124 LEd2d 182 (1993)
Cage v. Louisiana, 498 US 39, 111 SCt 328, 112 LEd2d 339 (1990) (per curiam)

2002 **NDJI – CIVIL** **C – 1.41**
(**2004** – reviewed
with no changes)

Burden of Proof – Clear and Convincing Evidence

The [Plaintiff] has the burden of proving by clear and convincing evidence all the facts necessary to establish:

[Insert Claim]

Clear and convincing evidence means that the evidence leads you to a firm belief or conviction that the allegations are true. This is a higher standard of proof than proof by the greater weight of the evidence. The evidence presented need not be undisputed to be clear and convincing.

* * *

Zander v. Workforce Safety and Ins., 2003 ND 194, 672 NW2d 668
State v. Schneider, 550 NW2d 405 n.4 (ND 1996)
In re Estate of Stanton, 472 NW2d 741 (ND 1991)
Stoner v. Nash Finch, Inc., 446 NW2d 747, 756 (ND 1989)
Pritchett v. Executive Director of Social Serv. Bd., 325 NW2d 217, 220 (ND 1982)
Zundel v. Zundel, 278 NW2d 123, 130 (ND 1979)

IN DISTRICT COURT, COUNTY OF BURLEIGH, STATE OF NORTH DAKOTA

State of North Dakota	)	Case No. 07 K 789
v.	)	
	)	
Charles Blunt,	)	
Defendant.	)	

DEFENDANT'S OBJECTIONS TO THE NORTH DAKOTA PATTERN INSTRUCTION ON REASONABLE DOUBT

Charles Blunt, defendant, hereby objects to the North Dakota pattern jury instruction on reasonable doubt.

1. The instruction does not inform the factfinder that the proof must be greater than the preponderance of the evidence standard and the clear and convincing evidence standard. Defendant contends this violates due process under our Federal Constitution. See *Addington v. Texas,* 441 U.S. 418, 433 (1979), wherein the United States Supreme Court held in regard to the clear and convincing evidence standard: "To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases."

Further, the pattern jury instruction in North Dakota on clear and convincing evidence, NDJI-CIVIL C-1.41 (2002), includes the sentence, "This is a higher standard of proof than proof by the greater weight of the evidence." Therefore, North Dakota has in fact given civil litigants the benefit of this comparison language. Defendant contends, therefore, that this comparison language is required by the due process protection of the North Dakota Constitution, Article I, Section 12. Due process, equal protection and fairness dictates that criminal defendants in North Dakota also get the benefit of this language.

2. The instruction does not correctly convey the concept of reasonable doubt to the jury. *Victor v. Nebraska,* 511 U.S. 1, 5 (1994). There is a reasonable likelihood that the jury will understand the instruction to allow conviction based on proof insufficient to meet proof beyond a reasonable doubt. *Victor v. Nebraska,* 511 U.S., at 6. Cf. *State v. Schneider,* 550 N.W.2d 405 (N.D. 1996).

a. The instruction does not define the proof in terms of possibilities and probabilities. In *California v. Mitchell Bros.' Santa Ana Theater,* 454 U.S. 90, 93, fn. 6 (1981), the United States Supreme Court spoke of clear and convincing evidence in terms of " . . . a higher probability than is required by the preponderance-of-the-evidence standard", citing C. McCormick, Evidence 320, p. 679 (1954). In *Victor v. Nebraska,* 511 U.S. 1, 14 (1994), the Court spoke of " . . . the very high level of probability required by the Constitution in criminal cases." Also, in *Victor v. Nebraska,*

511 U.S., at 11, the Court wrote: " . . . In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty", citing 1 Works of James Wilson, 519 (J. Andrews ed. 1896).

b. The instruction does not define the proof with language which states that the jury "needs to reach a subjective state of near certitude of the guilt of the accused". In *Victor v. Nebraska,* 511 U.S., at 15, the Court spoke of reasonable doubt in terms of requiring " . . . the need to reach a subjective state of near certitude of the guilt of the accused", citing *Jackson v. Virginia,* 443 U.S. 307, 315 (1979).

c. The instruction does not define the proof as all reasonable doubt. A reasonable doubt is any reasonable doubt, which is all reasonable doubt. Such language clarifies the proof and impresses upon the jury the importance of the proof. In *Victor v. Nebraska,* 511 U.S., at 28, Justice Blackmun, with whom Justice Souter joined, concurring in part and dissenting in part, wrote, " . . . unless guilt is established beyond *all* reasonable doubt, the accused shall go free." (Emphasis added).

d. The instruction does inform the jury that the State is not required to prove guilt beyond all doubt." See *Addington v. Texas,* 441 U.S. 418, 430 (1979). However, the instruction does not inform the jury of the context of this language. In *Victor v. Nebraska,* 511 U.S., at 17, 20, the Court recognized that "everything is open to some possible or

imaginary doubt"; also, that a reasonable doubt is "distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Defendant contends that failure to completely charge this language in its full context violates due process under our Federal Constitution. In the words of *Victor v. Nebraska,* "there was nothing else in the instruction to lend meaning to the phrase." *Victor v. Nebraska,* 511 U.S., at 16. Also, "the rest of the instruction provided insufficient context to lend meaning to the phrase." 511 U.S., at 21.

e. The final paragraph of the instruction equates "beyond a reasonable doubt" with "a firm and abiding conviction of the Defendant's guilt", and then ties this to "a full and fair consideration of the evidence presented in the case and not from any other source." Defendant contends this paragraph is misleading and violates Federal due process. The jury decides the facts of the case from the evidence presented in the case, but a reasonable doubt can arise from the evidence or from the lack of evidence. In *Jackson v. Virginia,* 443 U.S. 307, 317 (1979), the Court wrote, "A 'reasonable doubt,' at a minimum, is one based upon 'reason.' Further explaining, the Court also wrote, "A 'reasonable doubt' has often been described as one 'based on reason which arises from the evidence or lack of evidence', citing *Johnson v. Louisiana,* 406 U.S. 356, 360. *Jackson v. Virginia,* supra, at fn. 9. The final paragraph, therefore, is misleading, and, in fact, directs the jury away from any lack of evidence in deciding if the State's proof is beyond a reasonable doubt.

Dated this 5 day of December 2008.

/s/ Michael R. Hoffman

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DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 17

PROOF BEYOND A REASONABLE DOUBT

"Proof beyond a reasonable doubt" is a higher standard of proof than proof by the "greater weight of the evidence" used in most civil cases, and proof by "clear and convincing evidence" used in civil cases of higher importance such as termination of parental rights or civil commitment. In terms of possibilities and probabilities, you can believe that the accused is possibly or even probably guilty without reaching the very high level of probability of guilt required for proof beyond a reasonable doubt. To reach that level, you need to reach a subjective state of near certitude of the guilt of the accused. To convict, your belief has to be beyond all reasonable doubt.

On the other hand, the State is not required to prove guilt beyond all doubt. Everything is open to possible or imaginary doubt, or fanciful conjecture. You should not imagine doubt to justify acquittal.

A reasonable doubt is one based on reason after you have given full and fair consideration to all the evidence. A reasonable doubt can arise from the evidence itself, from a lack or insufficiency of evidence, or from no evidence proving an essential element of the crime charged.

Source: NDCC 12.1-01-03; NDCC 29-21-05; NDJI-CRIMINAL K-1.10 (2004) (modified)

1. In *Addington v. Texas*, 441 U.S. 418, 433 (1979), the United States Supreme Court held in regard to the clear and convincing evidence standard: "To meet due process demands, the standard has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." The pattern jury instruction in North Dakota on clear and convincing evidence, NDJI-CIVIL C-1.41 (2002), includes the sentence, "This is a higher standard of proof than proof by the greater weight of the evidence." Defendant has included similar language in the first paragraph of this requested instruction. First, defendant contends this comparison language is an aid to help the jury understand proof beyond a reasonable doubt. Second, defendant contends this comparison language is required by due process under our Federal Constitution. *Addington v. Texas*, supra. Finally, defendant contends this comparison language is required by the due process protection of the North Dakota Constitution, Article I, Section 12. North Dakota has given litigants the benefit of this comparison language in civil cases. Due process and fairness dictates that criminal defendants also get the benefit of this language.

2. Also in regard to the first paragraph of this requested instruction, the United States Supreme Court has spoken of the three standards of proof in terms of possibilities and probabilities. In *California v. Mitchell*

Bros.' Santa Ana Theater, 454 U.S. 90, 93, fn. 6 (1981), the Court spoke of clear and convincing evidence in terms of " . . . a higher probability than is required by the preponderance-of-the-evidence standard", citing C. McCormick, Evidence 320, p. 679 (1954). In *Victor v. Nebraska,* 511 U.S. 1, 14 (1994), the Court spoke of " . . . the very high level of probability required by the Constitution in criminal cases." Also, in *Victor v. Nebraska,* 511 U.S., at 11, the Court wrote: " . . . In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty", citing 1 Works of James Wilson, 519 (J. Andrews ed. 1896). Again, defendant believes this probability language is an aid to the jury in understanding proof beyond a reasonable doubt. Defendant also contends such language is required by due process under our Federal Constitution.

3. In *Victor v. Nebraska,* 511 U.S., at 15, the Court spoke of reasonable doubt in terms of requiring " . . . the need to reach a subjective state of near certitude of the guilt of the accused", citing *Jackson v. Virginia,* 443 U.S. 307, 315 (1979). Defendant has included this language in the first paragraph of this requested instruction as an aid to the jury, and because, defendant contends, it is required by due process under our Federal Constitution.

4. In *Victor v. Nebraska,* 511 U.S., at 28, Justice Blackmun, with whom Justice

Souter joined, concurring in part and dissenting in part, wrote, " . . . unless guilt is established beyond all reasonable doubt, the accused shall go free." (Emphasis added).

5. The State is not "required to prove guilt beyond all doubt." *Addington v. Texas,* 441 U.S. 418, 430 (1979) (emphasis added).

6. In *Victor v. Nebraska,* 511 U.S., at 17, 20, the Court recognized that "everything is open to some possible or imaginary doubt"; also that a reasonable doubt is "distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

7. In *Jackson v. Virginia,* 443 U.S. 307, 317 (1979), the Court wrote, "A 'reasonable doubt,' at a minimum, is one based upon reason.' Further explaining, the Court also wrote, "A 'reasonable doubt' has often been described as one 'based on reason which arises from the evidence or lack of evidence'", citing *Johnson v. Louisiana,* 406 U.S. 356, 360. *Jackson v. Virginia,* supra, at fn. 9.

Given: _____

Denied: _____

IN DISTRICT COURT, COUNTY OF BURLEIGH, STATE OF NORTH DAKOTA

State of North Dakota	)	No. 07 K 789
v.	)	Count I
Charles Blunt,	)	
Defendant.	)	

DEFENDANT'S MOTION AND BRIEF FOR ENTRY OF JUDGMENT OF ACQUITTAL AS TO COUNT I OF THE THIRD AMENDED INFORMATION, AND TO SET ASIDE THE JURY VERDICT OF GUILTY AS TO COUNT I

Charles Blunt, defendant, moves the Court to enter the judgment of acquittal granted defendant at the close of the prosecution's evidence, and to therefore set aside the jury verdict of guilty found by the jury following that judgment of acquittal.

The prosecution chose to charge various alleged misapplications of entrusted property in one count, that being Count I. Indeed, over multiple objections by the defense, both procedural and constitutional, including jeopardy objections, the prosecution added and proceeded with alleged misapplications not originally part of the charge in Count I. After the prosecution rested its case at trial, defendant made a motion for judgment of acquittal under Rule 29, NDRCrimP. The Court found the evidence to be "insufficient" as to one of the added alleged

misapplications of entrusted property, that being the grant of money to the North Dakota Firefighters Association, and granted defendant's Rule 29 motion as it related to the charge of the grant money.

Rule 29(a) provides in relevant part that the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." When defendant made his Rule 29 motion, the Court found evidence insufficient to sustain a conviction. Therefore, the Court must enter a judgment of acquittal as to Count I. Count I did not charge multiple crimes (as the prosecution consistently maintained in this case). The prosecution did not bring the various alleged misapplications of entrusted property in separate counts. Count I was only one count. The Court granted a judgment of acquittal as to Count I. Count I was therefore concluded. There cannot be more than one verdict on any one count.

Rule 31(b), NDRCrimP, provides for partial verdicts only as to multiple defendants and multiple counts. There is no such thing as a partial verdict for a single count. If the trial court intended to grant only a partial verdict as to Count I, the prosecution did not point out to the trial court this error in procedure. When the trial court granted defendant's Rule 29 motion for acquittal, it granted the motion as to all of Count I.

The prosecution may argue that the grant of money to the Firefighters was dismissed but that the other various allegations of misapplication of

entrusted property remained. "The first difficulty this argument encounters is that the Government did not in fact charge this offense in two counts. Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." *Sanabria v. United States,* 437 U.S. 54, 65 (1978); see *City of Dickinson v. Kraft,* 472 N.W.2d 441 (N.D. 1991). Procedurally, no language from Count I was stricken. Rule 7(d), NDRCrimP. Nor was Count I amended. Rule 7(e), NDRCrimP. There was no dismissal of a count involving only the grant. There was (only) a judgment of acquittal as to Count I.

The prosecution may also argue that the trial court erred in granting defendant's Rule 29 motion, either on the merits or procedurally, and that there was not a proper acquittal under Rule 29. However, this argument would come face to face with the fact that defendant was in fact acquitted; and a verdict of acquittal may not be reviewed without violating the rule of double jeopardy. "The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation.'" *Sanabria,* supra at 64, citing *Fong Foo v. United States,* 369 U.S. 141, 143 (1962), and *Green v. United States,* 355 U.S. 184, 188 (1957). "Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Sanabria,* supra; see *State v. Meyer,* 494 N.W.2d 364 (N.D. 1992), and *City of*

Dickinson v. Kraft, supra. Here, the Court found evidence "insufficient" and granted defendant's Rule 29 motion. The granting of that motion cannot be reviewed.

Finally, the prosecution may argue that evidence was simply "suppressed" or that an acquittal was not actually what the Court ordered. However, an acquittal is defined as "'a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Sanabria,* supra at 71, quoting *Lee v. United States,* 432 U.S. 23, 30 n. 8 (1977), and *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977); see *State v. Meyer,* supra, and *City of Dickinson v. Kraft,* supra. Here, an "acquittal" is exactly what happened. The trial court resolved some of the factual elements of the offense charged. It does not matte if the trial court was correct or not. There was an acquittal.

The bottom line here is that the prosecution charged only one count. The various alleged misapplications of property "are not severable in order to avoid the Double Jeopardy" protection against being twice put in jeopardy for the "same offense". *Sanabria,* supra at 73-75. "[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' . . . [citation omitted] the legal rulings leading to that judgment might be." *Sanabria,* supra at 75.

Wherefore, defendant requests the Court to enter the judgment of acquittal granted as to Count I, and

to rule that the North Dakota Rules of Criminal Procedure and double jeopardy require that the jury verdict as to Count I be set aside.

Dated this 5 day of January, 2009.

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STATE OF NORTH DAKOTA COUNTY OF BURLEIGH	IN DISTRICT COURT SOUTH CENTRAL JUDICIAL DISTRICT

The State of North Dakota, Plaintiff, vs. Charles Blunt, Defendant.	STATE'S RESPONSE TO DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT OF ACQUITTAL AND TO SET ASIDE THE JURY VERDICT OF GUILTY Crim. No. 07-K-0739 SA File No. F879-07

THE STATE OF NORTH DAKOTA through Cynthia M. Feland and Lloyd C. Suhr, Assistant Burleigh County State's Attorneys submits this Response to the Defendant Charles Blunt's (Blunt) Motion to Entry of Judgment of Acquittal and to Set Aside the Jury Verdict as to Count I.

At the close of the State's case in chief, and again at the close of all the evidence, Blunt moved for a directed verdict of acquittal under Rule 29 of the North Dakota Rules of Criminal Procedure. This court denied defendant's Rule 29 motion with respect to count II, relating to alleged bonuses.

As to count I, this court specifically found that there was sufficient evidence to allow the jury to consider the expenditures concerning the sick leave, relocation expenses, and the meeting and gift certificate expenses. However, it also found there was

insufficient evidence concerning the grant to the North Dakota Firefighter's Association to support a finding of guilty, and concluded that it would not allow the jury to consider any evidence pertaining to said grant.

The State objected to the court's order as being an improper use of a Rule 29 motion, arguing that the court was in essence suppressing evidence in the middle of trial and that Rule 29 did not authorize the exclusion of pieces of evidence.

This issue appears to be one of first impression in the State of North Dakota, and in all jurisdictions comprising the Eight Circuit for that matter. However, a very similar scenario presented itself in *U.S. v. Pacheco,* 434 F. 3d 106 (1st Cir. 2006). The State believes the facts and reasoning in that case are highly persuasive and should control here.

In *Pacheco,* the defendant Jason Pacheco (Pacheco) was indicted for conspiring with others to possess and distribute more than 5 kilograms of cocaine. *U.S. v. Pacheco,* 434 F.3d 106, 110 (1st Cir. 2006). Pacheco's case was severed and he stood trial alone *Pacheco,* 434 F.3d at 110. After the close of the government's case, Pacheco submitted a motion for directed verdict based on there being insufficient evidence. *Id.* The trial court deferred ruling on the motion until the close of all the evidence. *Id.* At the close of the case, the trial court granted a "partial directed verdict" because the government had only established that Pacheco was part of a small "spoke"

of the conspiracy, not the larger "hub" conspiracy alleged in the indictment. *Id.* Consequently, the trial court concluded, that a jury could not reasonably find that Pacheco was part of a conspiracy to gain and deliver 260 kilograms of cocaine, as argued by the government. *Id.* While the trial court granted this partial directed verdict, it did not grant Pacheco's request for a finding of not guilty. *Id.*

The trial court did not mention its narrowing construction of the charge in its jury instructions, and only provided a generic conspiracy instruction and a special verdict form requiring a finding on drug quantity. *Id.* Pacheco objected, but the jury found him guilty of conspiracy to possess with intent to distribute more than 5 kilograms of cocaine. *Id.*

Pacheco moved for a new trial, which was denied by the trial court. *Id.* Pacheco moved for reconsideration and the trial court, upon further consideration, found that: 1) it had erred in issuing its partial directed verdict given other evidence presented at trial which supported a finding that Pacheco was indeed a part of the larger "hub" conspiracy, but 2) the jury had not been influenced by the erroneous ruling and that 3) regardless, Pacheco had waived any procedural argument that the trial court lacked the authority to revisit the issue of the partial directed verdict. *Id.* at 111. Pacheco appealed.

On appeal, Pacheco made a double jeopardy argument and a due process argument. As to the double jeopardy argument, he argued that by granting the

partial directed verdict, submitting the case to the jury, and then rescinding its ruling, his right against double jeopardy was violated. The First Circuit Court of Appeals disagreed.

The Court observed that, in determining whether or not the partial directed verdict was a judgment of acquittal or not, the guiding factor was whether it was intended as a resolution of some or all of the factual elements of the offense charged. *Id.* at 112. A resolution in Pacheco's favor of a necessary factual element of the offense would be deemed a definitive determination that he could not be convicted. *Id.*

The Court held that the partial directed verdict was not intended as a definitive determination for three reasons: 1) if it was the trial court's intention to do so, it would not have denominated its ruling as "partial", which it did; 2) it would not have denied Pacheco's motion for a verdict of not guilty, which it did; and 3) it would have been pointless to send the case to the jury, which, again, it did. *Id.* at 113. The Court found that the "partial directed verdict" was an evidentiary comment of the trial court; a limitation on the scope of the conspiracy that the court would allow the jury to consider, not an attempt to grant a partial acquittal. *Id.*

As to the due process issue, the First Circuit Court of Appeals concluded that Pacheco's right to a fair trial had been violated, but for reasons not present in this case. As previously noted, the trial

court in *Pacheco* did not mention its narrowing construction of the charge in its jury instructions, and only provided a generic conspiracy instruction and a special verdict form requiring a finding on drug quantity. The First Circuit Court of Appeals found this to be a violation of Pacheco's right to a fair trial.

Specifically, the First Circuit Court of Appeals noted that when the trial court announced the partial directed verdict, it led Pacheco to believe, at a minimum, that only the evidence establishing that he was a "spoke" in the conspiracy would be presented to the jury. *Pacheco,* 434 F. 3d at 116. When the trial court failed to conform its jury instructions to parallel this, with no notice to the defense, it was a violation of fundamental fairness. *Id.* The First Circuit Court of Appeals further concluded that the defense was prejudiced by the trial court's actions as it affected the way defense counsel shaped his summation to the jury and his ability to request additional jury instructions on there being multiple levels to the conspiracy. *Id.* at 116-117.

In this case, Blunt was charged in count I with Misapplication of Entrusted Property (public funds) in an amount in excess of $10,000. There were multiple factual "streams" of evidence comprising this total, including an allegation he had misapplied gift certificate expenditures totaling $4,331, meeting expenses totaling $7,053.29, sick leave totaling $7,053.14, relocation expense totaling $7,617.95, and the grant to the North Dakota Firefighter's Association.

Just as in *Pacheco,* this court limited the scope of its ruling. Specifically, this court made it very clear that it was only limiting the State's ability to present argument as to the grant funds. This court specifically concluded that there was sufficient evidence to allow the jury to consider the expenses incurred for the gift certificates, meeting expenses, sick leave, and relocation expenses. Further, just as in *Pacheco,* this court denied the defense's motion for a verdict of acquittal. Lastly, just as in *Pacheco,* this court allowed count I to be sent to the jury for deliberation. It seems clear that this court's ruling was intended as an evidentiary comment; a limitation on the scope of the evidence the jury could consider, not an attempt to grant an acquittal.

Even with the exclusion of any evidence relating to the grant funds, the remaining evidence was more than sufficient to satisfy the elements of the offense set out in count I. The total of the expenditures still before the jury on count I, (gift certificates, meeting expenses, sick leave, and relocation expenses) was $26,055.38; an amount well in excess of the $10,000 threshold the State was required to establish.

However, unlike *Pacheco,* Blunt was not prejudiced by the trial court's ruling so as to violate his fundamental right to a fair trial. This court's instructions to the jury were entirely consistent with its ruling; that the jury would not be allowed to consider the evidence pertaining to the grant monies. Stemming from this, Blunt had more than adequate notice as to how the evidence surrounding the grant funds

was going to be treated, so as to shape his closing argument and requested closing jury instructions accordingly. At no time has Blunt complained that this court's ruling limited his ability to instruct or argue to the jury. In fact Blunt requested a special verdict requiring the jury to unanimously agree on the expenditures which comprised the $10,000 threshold.

For the reasons stated herein, the State respectfully requests that Blunt's motion for acquittal on count I be denied in all respects.

Dated this 14th day of January, 2009.

/s/ Cynthia M. Feland
Cynthia M. Feland, Assistant
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Dated this 14th day of January, 2009.

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IN DISTRICT COURT, COUNTY OF BURLEIGH,
STATE OF NORTH DAKOTA

State of North Dakota	)	Case No. 07 K 789
v.	)	Count I
Charles Blunt,	)	
Defendant.	)	

DEFENDANT'S REPLY BRIEF

Charles Blunt, defendant, files this brief in reply to the State's brief dated January 14, 2009.

The State's brief fails to address the North Dakota Rules of Criminal Procedure, *Sanabria v. United States,* 437 U.S. 54 (1978), or the North Dakota Supreme Court cases addressing *Sanabria v. United States,* all discussed in Blunt's initial brief dated January 5, 2009. The State relies only upon *United States v. Pacheco,* 434 F.3d 106 (1st Cir. 2006). *United States v. Pacheco* fails to address *Sanabria v. United States. Sanabria v. United States* controls over *United States v. Pacheco.*

Sanabria v. United States specifically rejected the "'discrete bas[es] of criminal liability' duplicitously joined in a single count", 437 U.S. at 61, which is now being advocated by the State with different phraseology: "There were multiple factual 'streams' of evidence comprising this total". State's Response,

p. 4. The State chose to charge these discrete bases of criminal liability duplicitously in a single count. Indeed, during the course of the case, Blunt objected to the addition of bases of criminal liability by the State and warned of duplicity. (Docket #'s 81, 91, 110). *Sanabria* rejected the State's arguments and claims here, controls the issue at bar, and mandates an acquittal be entered in Count I.

Sanabria shows there can be no "dismissal" or "suppression" of a discrete portion of one count. On the way Count I was charged, only a judgment of acquittal can be entered on Count I.

Dated this 26th day of January, 2009.

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